

**STRENGTHENING SEPARATION OF POWERS
BETWEEN THE LEGISLATURE AND THE EXECUTIVE
IN MALAYSIA**

BY

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Synopsis

As a constitutional doctrine, Separation of Powers was primarily created to prevent the government from abusing its powers and from acting in an arbitrary manner. Within the Malaysian Parliament however, the existence of developed political parties have on the contrary, emptied the doctrine substantially out from all its substance, leaving merely the doctrine's bare framework intact. This dissertation therefore, aims to expose the weakness of the doctrine of Separation of Powers in the context of developed political parties in the Malaysian Parliament; in particular the relationship between the Legislature and Executive.

If we were to merely analyse and expose the negative impact of political parties on the doctrine of Separation of Powers in the Malaysian Parliament, this dissertation will be insufficient. Therefore, in order to paint a complete picture, this dissertation will also proceed to suggest various proposals that will be taken from different jurisprudences to strengthen the doctrine of Separation of Powers within the Legislature and Executive of the Malaysian Parliament.

The writer hopes that by exposing the weakness of the doctrine of the Separation of Powers in the Malaysian Parliament in light of political parties and making various proposals to strengthen the doctrine of the Separation of Powers, he is able to paint a complete picture of the relationship between political parties and the Malaysian Parliament.

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Introduction

Numerous books and articles have been written on the constitutional doctrine of the Separation of Powers.¹ For example, Polybius believed that because the three branches of the government shares the responsibility of ruling the country, the doctrine of Separation of Powers prevents the corrupting influence of unchecked powers. This constitutional concept is so fundamental that most textbooks have devoted a chapter to it.² The learned author, WB Gwyn³ had in fact written a book focusing on the purposes of the doctrine of Separation of Powers and how the doctrine has evolved through time.

On the other hand, books and materials, which are written on political parties and their operation, are equally substantial and comprehensive. Some of these books have analysed the creation and operation of organisation of the various political parties in detail. For example, Maurice Duverger has written a book detailing the structures and organisation of the different political parties in different countries.⁴ The same author has also written on the development of political parties in the United Kingdom whilst authors like Sorauf and Beck⁵ has written on the development of political parties in the United States.

¹ Jain, M. P., *Treaties on Administrative Law, Volume I*, Nagpur, Wadhwa and Company (1996) at p31 and Barnett, Hilaire., *Constitutional and Administrative Law*, Cavendish Publishing (4th Ed, 2002), pg105 are notable examples. Articles includes Montesquieu “ *Book XI. The Spirit of Laws*” http://www.constitution.org/cm/sol_11.htm” pg 1 of 21.

² Marshall Davis Lloyd, “*Polybius and the Founding Fathers: the separation of powers*: <http://www.sms-va.com/mdl-indx/polybius/polybius.htm>) pg 3 of 18.

³ WB Gwyn., *The Meaning of the Separation of Powers, An analysis of the Doctrine from its origin to the adoption of the United States Constitution*, The Hague: Martinus Nijhoff,(1965)

⁴ RS Milne and Diane K. Mauzy, *Politics and Government In Malaysia*; Federal Publications (1978) See also R.S. Milne, *Government and Politics in Malaysia*, the University of British Columbia; Houghton Mifflin Company and K.J. Ratnam, *Communalism and the Political Process in Malaya*; University of Malaya Press (1965).

⁵ Sorauf and Beck; *Party Politics in America* (6th Ed); Scott, Foresman and Co (1988)

Within the Malaysian context, authors such as RS Milne, Diane K. Mauzy and K.J. Ratnam have written extensively on the development, structures and organisation of political parties of Malaysia.

Although there are abundant resources, academic discussions and materials which falls either exclusively or mainly on the area of the constitutional doctrine of Separation of Powers or political parties, to the best of my knowledge resources, academic discussions and views have failed to portray the doctrine of Separation of Powers within Parliament today in the context of political parties. Having said that, this does not mean that there are no materials and references which discusses the relationship between Parliament and the political parties. However, such materials are limited.

Some authors, for example Maurice Duverger only discussed this relationship in passing.⁶ Furthermore, his discussion is strictly limited to western political parties and is not applicable in light of the different economic, political and social foundation of Malaysia. Short and ad hoc articles are also found in the internet. Nevertheless, they do not discuss the relationship in the context of the Malaysian Parliament.⁷

To the best of my knowledge, the resources, academic discussions and materials in the Malaysian context are further limited. Although, Mavis Puthuchearry did attempt to discuss the impact of political parties on the Malaysian Parliament, her discussion was only limited to negative impact of political parties on the doctrine of representative theory in the Malaysian Parliament.⁸ She did not address the larger impact which political parties have on the electoral process as well as their impact

⁶ Duverger, Maurice *Political Parties, Their Organisation And Activity In The Modern State*; Methuen & Co. Ltd (3rd Ed)(1964).

⁷ Examples of articles includes *Parliament and Government; Parliament in a Modern State*; at <http://www.parliament.gov.at/pd/dia/e> (anon) and Moberg, Erik, *A Theory of Democratic Politics* at <http://www.mobergpublications.se/index.html>:

⁸ Puthuchearry, Mavis; ' *Role of the Executive: The Relationship Between Party And Government.*, In *Reflections On The Malaysian Constitution* '; (Ed.: Aliran Kesedaran Negara)

on the functions of Parliament. Other authors merely made a pass passing remark on the impact of political parties on the Malaysian Parliament without further analysis.⁹

In view of the limited resources and discussions which focuses on the relationship between Parliament and the political parties, this dissertation intends to re-examine the constitutional doctrine of the Separation of Powers that exists within the Legislature and Executive in the Malaysian Parliament in light of today's developed political parties.

Even though the doctrine of Separation of Powers has evolved into five versions, nevertheless, the two main purposes which the doctrine sets out to achieve remains the same. The purposes are firstly to enable each institution in the state to discharge their function effectively and secondly to prevent the government from acting in a tyrannical and arbitrary manner.¹⁰

In the United Kingdom, members of the early Westminster Parliament (from 1833 to around 1967) had successfully followed the doctrine both structurally and substantially. This was because Members of Parliament then were able to secure their seats in Parliament solely by using their own resources and efforts. The political parties, being originally loose decentralised cadre types of organisations, merely assisted the respective candidates during the electoral process to ensure their success. In view of the political parties' limited role and influence, the Members of Parliament then were able to take a stand which was independent of their party. The independence which the Members of Parliament had augured well for the doctrine of the Separation of Powers.¹¹

With the passing of the *Second Reform Act 1867 (UK)*, the franchise for voting members in the United Kingdom was dramatically increased from a small-restricted group of middle-class based voters to millions of voters encompassing other classes of

⁹ Abdul Aziz Bari and Hugh Hickling., *The Doctrine of Separation of Powers and the Ghost of Karam Singh*, *The Malayan Law Journal Articles* [2001] 1MLJA 21 and [2001] 1 MLJ xxi at p2 of 6

¹⁰ WB Gwyn op cit 3

¹¹ Budge Ian, et al, *The New British Politics*, Longman (1998) at p370-p373

society. As a result of the rapid increase in the number of electorates, the Members of Parliament and candidates alike from were no longer able to rely on their own resources and efforts to secure their election. Instead, they were compelled to supplement and were quite soon replaced by political parties which were more organised and efficient to secure their seats in Parliament.

As the candidates and Members of Parliament began to depend and rely more on political parties, their influence over the candidates and Members of Parliament also began to increase gradually. This has created a gross imbalance which favoured the political parties over the candidates and Members of Parliament. Because of such imbalance, political parties are now able to successfully transpose their entire structure into the Westminster model of Parliament whereby the leaders of the majority party now occupy the Executive whilst its subordinate members fill the Legislature. This imbalance has enabled the political parties to transform Parliament from a representative and independent institution which was able to check on the Executive effectively into an institution which is now dependent upon and used by the political parties for their own personal gain. The combined impact of such transposition together with the heavy dependence of Members of Parliament on the political parties has substantially emptied the doctrine of Separation of Powers out from all its substance leaving merely its structures intact today.¹²

When the British intervened in the political affairs of Malaya, they had introduced amongst others, the Westminster model of the Parliamentary government into Malaya (now Malaysia) in ignorance and without considering the adverse impact which political parties may have on the Westminster model of the Parliamentary government. Furthermore, when the British introduced the Westminster model of the Parliamentary government into Malaya (now Malaysia), they had also failed to consider the economic and social foundations of Malaya (now Malaysia) which were far different from the British. The direct importation of a Parliamentary government into Malaya (now Malaysia) without considering the factors mentioned above has further weakened the doctrine of Separation of Powers.

¹² See Chapters entitled '*Impact of Political Parties on Separation of Powers.*'

Besides the existence of political parties, several factors had further contributed to the dilution of the doctrine of Separation of Powers within the Malaysian Parliament. Amongst others, these additional factors¹³ include -

- (a) the historical development of political parties in Malaysia which differs from the historical development of political parties in the western countries. Unlike political parties of the United Kingdom which are established to protect a particular class of society, the influences of the political parties in Malaysia are stronger because they were created to protect and has constantly received the support of the respective communities in Malaysia;
- (b) various statutes and rules of the United Kingdom which were adopted wholly into the Malaysian Parliament (for example, the party whip system) and the various amendments to the statutes and rules of Malaysia including the Federal Constitution; whether the amendments were made to deal with specific situations which had occurred in the history of Malaysia but was never changed (for example, the constitutional amendment to Article 150 and Article 63(4) of the Federal Constitution and the amendment to the Sedition Act 1948 amongst others which were all enacted to deal with the communist insurgency and the racial riots of 1969) or it was amended for some other reasons (for example the constitutional amendments to the powers of the Election Commission and the composition of the Dewan Negara) had collectively enabled the political parties to control the composition of the Malaysian Parliament and tilted the balance of power in favour of the Executive over the Legislature in the Malaysian Parliament;
- (c) the mentality of the main races in Malaysia that is the Malays, Chinese and Indians which generally accepts the decisions of their respective leaders without much or any questioning has substantially enabled the one party dominated Executive to control the Legislature psychologically;

¹³ See Chapters entitled '*Parliament's Composition – A Critical Analysis of the Dewan Rakyat*', '*Parliament's Composition - A Critical Analysis of the Dewan Negara (Senate)*', '*Parliament's Composition – Criticisms on the Methods of Disqualification*', '*Parliament's Law Making Function – A Critical Analysis*', '*Parliament's Role in Scrutinising the Executive*.'

(d) and finally the constant sterile and ineffective Malaysian Opposition in carrying out its function as the alternative government has allowed one political party which is the National Front in Malaysia to assert its influence and control in both the Executive and Legislature of the Malaysian Parliament.

To strengthen the doctrine of Separation of Powers within the Malaysian Parliament, in particular the relationship between the Executive and Legislature, we need a two-fold reform.

Firstly, the organisations and structures of the political parties in Malaysia should be modified in order to break, prevent and limit their domination in the Malaysian Parliament. Various proposals will be presented throughout this dissertation to achieve this. These proposals would amongst others include the American jurisprudence as well as Islamic jurisprudence. For example, the practise of primaries in the American context was clearly explained in books like *Parties, Politics and Public Policy in America*¹⁴, *Politics, Parties and Elections in America*¹⁵ and *The Political Philosophy of Robert M. La Follette*.¹⁶

Secondly, various reforms, which amongst others include the American jurisprudence as well as the Islamic jurisprudence, will be presented to strengthen the structure and practices of the Malaysian Parliament itself. The proposed reforms would include reforms for both houses of the Malaysian Parliament and the method of electing members into both houses of the Malaysian Parliament.

An example of the Islamic concept which will be proposed would be the concept of *Shura* which was explained by Mohammed Hashim Kamali.¹⁷ In essence, this concept

¹⁴ Keefe, J. Williams, *Parties, Politics and Public Policy in America*., (6th Ed., 1991), CQ Press, A Division of Congressional Quarterly.

¹⁵ Bibby, John F, *Politics, Parties and Elections in America*, (3rd Ed 1996), Nelson-Hall Publishers.

¹⁶ Ellen Torelle, ed., *The Political Philosophy of Robert M. La Follette*., Madison, Wis., Robert M. La Follette Co., (1920)

¹⁷ Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Ilmiah Publishers Sdn. Bhd. (Rev Ed) (1994)

compels the Executive to consult the Legislature before the Executive implements their proposals.

It must be borne in mind that all these reforms which are proposed in this dissertation have a common aim; that is to limit the dominance and control of the Executive over the Legislature thereby balancing the power between the two organs in light of political parties.

The proposed reforms to the political parties as well as the Malaysian Parliament should be carried out simultaneously if the doctrine of Separation of Powers between the Legislature and the Executive is to be strengthened.

To realise these reforms however, the Members of the Malaysian Parliament must be willing to initiate the necessary steps to implement these reforms. Unless and until Parliament initiates the steps to implement these reforms, these reforms will merely remain an intellectual exercise.

Chapter 1

Separation of Powers

Although the constitutional principle of Separation of Powers¹ has existed in various forms at different times and in different contexts, it essentially aims to achieve two basic purposes. These purposes, being firstly, to achieve efficiency² in the government and secondly, to prevent absolutism and guard against tyrannical and arbitrary powers of the state, was expressed by MP Jain, the learned author in the following manner:

“The purposes underlying the separation doctrine is to diffuse governmental authority so as to prevent absolutism and guard against tyrannical and arbitrary powers of the state, and to allocate each function to the institution best suited to discharge.³”

By acknowledging that mankind is inherently tempted to corruption, the doctrine of Separation of Powers was established to limit the power and dominance, in particular between the Executive and the Legislature, thereby preventing the creation of a despotic and tyrannous government.

Madison in Federalist 47⁴ acknowledged that “ The accumulation of all powers, legislative, executive and judiciary, in the same hands... may justly be pronounced

¹ According to WB Gwyn, “no one has been able to find an explicit statement of the separation of powers” WB Gwyn., *The Meaning of the Separation of Powers, An analysis of the Doctrine from its origin to the adoption of the United States Constitution*, The Hague: Martinus Nijhoff, (1965) pg. 9

² The “Efficiency Method” which will be discussed herein below.

³ Jain, M. P., *Treaties on Administrative Law, Volume 1*, Nagpur, Wadhwa and Company (1996) at p31.

⁴ *The Federalist Papers* at http://lcweb2.loc.gov/const/fed/fed_47.html.

Polybius believed that because the three branches of the government shares the responsibility of ruling the country, the corrupting influence of unchecked power is thus abated and stasis is achieved. Marshall Davis Lloyd, “Polybius and the Founding Fathers: the separation of powers: <http://www.sms-va.com/mdl-indx/polybius/polybius.htm>” pg 3 of 18.

Montesquieu “ Book XI. The Spirit of Laws” http://www.constitution.org/cm/sol_11.htm ” pg 1 of 21.

the very definition of tyranny” whilst Montesquieu declared that “...But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true that virtue itself has need of limits?”

To achieve these two main aims, the learned author, WB Gwyn submitted that five different versions⁵ of the doctrine of Separation of Powers, all of which will be discussed herein below were created.

The five different versions are ‘the efficiency version’, which was aimed to achieve efficiency in the government and Parliament, ‘the common interest version’, ‘the accountability version, ‘Rule of Law version’ and ‘balancing version’, all of which were created to prevent the executive arm from abusing and dominating the legislative arm.⁶

(1) The efficiency version.

The efficiency version proposes that the various functions of the government must be exclusively allocated to the respective designated bodies i.e. that there should exist a separate “legislative” and “executive” function in order to achieve efficiency and expediency.

This version contends that if any organ of government is vested with more than one function, it may be burdened with too much work; which in turn may finally result in delay of the government’s work. For John Locke⁷, the reason for the legislature’s inefficiency in executing laws lies in the fact that they are “usually too numerous, and

⁵ Supra lat p127.

⁶ ‘ Its object is the preservation of political safeguards against the capricious exercise of power.... the great end of the theory is, by dispersing in some measure the centers of authority,[absolutism is prevented.]’, Jaffe and Nathanson, *Administrative Law: Cases and Materials* (1961) at p38.

⁷ Ch. XIV, Locke, John, *Of Civil Government Second Treaties*, Gateway Ed, Henry Regnery Co. Chicago, para 160

so too slow, for the dispatch requisite to Execution.” Similarly, Montesquieu echoed the same view,⁸ in the following manner:

“.... the executive power ought to be in the hands of the monarch, because this part of the government which nearly always requires dispatch is better administered by one than by many.”

Secondly, the proponents of this version argue that since members of the respective organs were chosen into that organ because of their specific capabilities (for example, members of the Legislature are appointed because of their capability to legislate and members of the Executive for the similar reason),⁹ the Legislature and the Executive should be separated in its membership and function among others in order to achieve efficiency.

The efficiency version in the United Kingdom has in the course of time evolved into an important principle of effective government.¹⁰

(2) The common interest version.

The common interest version grew out of the fear that because Members of Parliament then, who were also exercising executive functions could simultaneously hold lucrative offices outside of Parliament as well, they may act upon their own interest, thereby destroying the common interest and freedom of the citizens, who ought to be the possessor.¹¹

⁸ Supra 4 Bk. XI, Ch. 6

⁹ “ ... I would not divest the kind of his executive powers, much less would I the Parliament assume them, or perpetuate their sitting: They are a Body more fitted to make Laws, and punish the Breakers of them, than to execute them.”Nevile, Henry, *Plato Redivivus* at pg 241

¹⁰ Supra 1 pg 34

¹¹ Lilburne, John “ Whether it be not most agreeable to Law, justice, equitie and conscience, and the nature of a Parliament mans’ place, that during the time of his being a member, he should lay aside all places of profit in the Common wealth, and tend only upon that function, for which he was chosen.” Supra 1 pg 21

The doctrine of Separation of Powers was therefore invoked to ensure that Members of Parliament would protect the common interest rather than their own private interest in the performance of their functions.¹² Simultaneously, the doctrine also aims to prevent tyranny within the government.¹³

(3) The accountability version

The accountability version, which was also established by John Lilburne¹⁴ and explained by Marchamont Needham¹⁵ in essence, seeks to make public officers (ie the Executive) be accountable to the Legislature for the formers' actions. To achieve this, the Executive and the Legislature must be separated in terms of membership and function.

In all kingdoms and states whatsoever, where they have anything of freedom among them, the *legislative and executive powers have been managed in distinct hands*: that is to say, the *law-makers have set down laws, as rules of government: and then put power into the hands or others (not their own) to govern by those rules*; by which means the people were happy, having no governors, but *such as were liable to give an account of government to the supreme council of law-makers*.(emphasis added)¹⁶

¹² There was a commonly held charge that military officers in Parliament were prolonging war for their own advantage. Supra 1 pg 40

¹³ Montesquieu attempted to show amongst others that separation of powers is required between the legislature and executive to maintain the rule of an impartial law made in the public's interest. Supra 1 pg 105

¹⁴ Lilburne, John " The Parliamenets worke is to repeale old Laws and to make new ones....to raise money and see it rightly and providently disposed of (but themselves are not in the least to finger it) it being their proper work to punish those that imbezle and wast it, but if they should finger it and waste it, may not the Kingdome easily be chetted of its treasure, and also be left without meanes to punish them for it" Lilburne, John postscript; *A Defiance to Tyrants.*, London.(2nd ed ,January 1648.).

¹⁵ Needham,Marchamont, *The Excellence of a Free-State*, pg 212-220.

¹⁶ Ibid

(4) Rule of Law version.

A version that was developed by John Locke and best formulated by Montesquieu in his analysis of the English Constitution; this version is the most well known and oft quoted version among the five versions of the doctrine of the Separation of Powers.

The Rule of Law version argues that given the corrupt state of human nature, if the administrative and legislative discretions are not restrained, arbitrary government and the foundation of tyranny was bound to follow. To avoid the possibility of such disasters, the legislative and executive function should be separated in terms of composition and function.

For Locke, a failure to adhere to the doctrine of Separation of Powers may result in the prevalence of arbitrary powers, which in turn may violate men's inalienable rights.¹⁷ Similarly, Montesquieu attempted to show that if the three functions of the government are not separated, the same person may enact tyrannical laws in order to execute them tyrannically.

“ When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”

“ There would be an end to everything, were the same man or the same body, whether of the noble or of the people, to exercise those three powers, that of

¹⁷ “Because those laws which are constantly to be executed, and whose force is always to continue, may be made in a little time, therefore there is no need that the legislative should be always in being, not having always business to do; and because it may be too great a temptation to human frailty, apt to grasp at power for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government.” Locke, John, *Of Civil Government Second Treaties*, Gateway Ed, Henry Regnery Co. Chicago.

enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”¹⁸

An analysis of the accountability version and the rule of law version reveals the following differences. Whilst the accountability version stresses on the accountability of *individual members* to Parliament, the latter version strives to ensure that *the government* is maintained under law. Today, both these version are now known as the doctrine of Individual Ministerial Responsibility and Collective Ministerial Responsibility respectively.

(5) Balancing version

The old accountability argument later developed into the idea of the need for checks and balances between the Executive and Legislative branches of government.

Bolingbroke, one of England’s great orators ¹⁹ and Hugh Montague Trenchard²⁰ revised the separation of powers which originally stressed on independency, into one of dependency, which enabled each organ to check on the other thereby creating a balance of power between the Legislature and Executive.

“ The constitutional Dependency, as I have call’d it for Distinction’s sake, consists in this; that the Proceedings of each Part of the Government, when they come forth into Action and affect the whole, are liable to be examin’d and controul’d by the other Parts. The Independency pleaded consists of This; that the Resolutions of each Part, which direct these Proceedings, be taken

¹⁸ Montesquieu op cit 4, *The Spirit of Laws: Book XI. Of the Laws Which Establish Political Liberty, with Regard to the Constitution*, para 6

¹⁹ Viscount Bolingbroke was one of England’s great orators. He became the favourite and powerful Marlborough and was appointed secretary of war in 1704. He retired from politics in 1734 and spent most of his remaining years devoting himself to political and philosophical writing. At IUp Info.com at <http://www.lupinfo.com/encyclopedia/S/St.John-H-political-rise.html>.

²⁰ Hugh Montague Trenchard, 1st Viscount. As a British air marshal, he commanded the Royal Flying Corps during World War I and shaped the Royal Air Force during World War II. He was created a peer in 1936. The Columbia Encyclopedia, (6th Ed)(2001) at <http://www.bartleby.com/65/tr/Trenchar.html>

Independently and without any Influence, direct or indirect, on the others. Without the first, each Part would be at Liberty to attempt destroying the Ballance, by usurping, or abusing Power; but without the last, there can be no Ballance at all.”²¹

After a careful study of Montesquieu’s writings, W.B. Gwyn submits that although Montesquieu had successfully developed the rule of law version, he had in fact failed to employ the balancing version of the doctrine of Separation of Powers.²² Instead, in error, Montesquieu had recognised the balancing version as an independent doctrine²³ distinct from the doctrine of Separation of Power but nevertheless an important element for political liberty.²⁴

The balancing version was applied by and large in the American Constitution, as evident in the writings of the founding fathers, which inter alia includes John Adams. John Adams’ view was expressed in a letter to Richard Henry Lee on 15 November 1775 in the following manner:-

“ A legislature, an executive and a judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these powers against the other two, that the efforts of human nature towards tyranny can alone be checked and restrained, and any degree of freedom preserved in a constitution.”²⁵

²¹ Bolingbroke, *The Craftsman*, Vol. VII p 87

²² Supra 1 pg 108

²³ Ibid 16 “Were the executive power not to have a right of restraining the encroachments of the legislative body, the latter would become despotic; for as it might arrogate to itself what authority it pleased, it would soon destroy all the other powers...The legislative body...are restrained by the executive power, as the executive is restrained by the legislative.” Para 6 pg 7 of 21

²⁴ Supra 1 at page 109-111

²⁵ Letter to Richard Henry Lee, 15/11/1775, in C.F Adams (ed.), *The Works of John Adams*, Boston, (1865), Vol. IV, p.186. For other examples of the balancing version of the separation of powers in America, see John Jay’s letter to Jefferson on 18/8/1786, in *Jefferson Papers*, Vol.10, p272 and that of George Washington in J.C. Fitzpatrick (ed.), *The Writings of George Washington*, Washington (1931-1944), Vol.29,p410; Vol30 pp300-301; Vol 35, pp 228-229.

Although the American constitution continued to adopt the traditional rule of law and efficiency version, they have also developed a new balancing version in two aspects.

Firstly, the Americans had brought the judiciary into the balance of governmental power ie via the creation of judicial review. Secondly, they have also developed the idea that the chief executive ('President' in the American context) is as much the representative of the people as is the legislative assembly, which was a departure of the traditional belief.²⁶ If this concept is accepted, then the Executive had as much right to call the Legislature to account, as the Legislature has to call the Executive to account.

Although theoretically the doctrine of Separation of Powers can be neatly compartmentalised into the five versions mentioned hereinabove, however in practise, it seems that a combination of the various versions of the said doctrine is needed to achieve an effective and qualitative government. History has in fact shown that various jurists and eminent writers have adopted a combination of versions of the Separation of Powers, each having one dominant version appearing in their writings.

For example, John Lilburne applied a combination of the accountability version and common interest version whilst Marchamont Needham's version contained the accountability and rule of law versions. Although John Locke's version of the Separation of Powers was a combination of the rule of law and efficiency version, he had attributed considerable importance to the former whilst developing a rather inferior form of the efficiency version. As for Montesquieu, although he was known to have developed the rule of law version of the Separation of Powers, he had also applied the balancing version.²⁷

²⁶ Traditionally, it was believed that only the legislative assembly represents the people.

²⁷ *WB Gwyn*, op cit 1 at pg 39-41; at pg 56 ; pgs 71-77 and at pgs 108-109

The ideal Parliament

An ideal Parliament should reflect the Separation of Powers in all its five versions mentioned above. In so doing, the ideal Parliament would not only achieve efficiency in its functions but more importantly, the balance of powers between the Executive and Legislature in Parliament would be maintained since each organ is able to act as an effective restraint on the other.

If the Malaysian Parliament which adopts the Westminster model of parliamentary government and is composed of members from developed mass based political parties is audited against the model of the ideal Parliament, an imbalance of power which tilts favourably towards the Executive as against the Legislature would be created.²⁸ Such an imbalance would fail to create a proper balance of power between the Executive and Legislature in Parliament; which was what the four versions²⁹ of the Separation of Powers set out to achieve.

The subsequent chapters of this dissertation will attempt to explain and prove the contention that the combination of a parliamentary system of government and the existence of developed mass based political parties in the Malaysian context has failed to developed all but one version of the doctrine of Separation of Powers, that is the ‘efficiency version.’ The following approach will be adopted to prove this:-

Firstly, an attempt to discover the reasons why the Malaysian Parliament adopted the Westminster model of parliamentary government will be discuss in Chapter 2. In view of the fact that legislatures, including the Malaysian Parliament are now composed wholly or substantially of developed political parties, this dissertation will proceed to examine the organisational structures of political parties and analyse their historical development in Chapter 3.

²⁸ See Chapters 5,6,7,8 and 9 of this dissertation.

²⁹ These are the ‘the common interest version’, ‘the accountability version’, ‘Rule of Law version’ and ‘balancing version’.

After establishing the reasons for choosing a Westminster type of parliamentary government and having analysed the structures and development of political parties in Malaysia, this dissertation will proceed to: -

Analyse the impact of a parliamentary government which is composed of members of developed mass based political parties in the Malaysian context on the constitutional doctrine of the Separation of Powers in particular the ‘the common interest version’, ‘the accountability version’, ‘Rule of Law version’ and ‘balancing version’. Chapter 4 of this dissertation will make a general analysis of such impact whilst a detailed analysis will be made on the compositions of the respective chambers in the Malaysian Parliament. These analyses are to be found in Chapters 5,6 and 7 of this dissertation respectively.

After analysing the impact which developed mass based political parties have on the composition of the Malaysia Parliament, Chapters 8 and 9 will proceed to analyse the impact of Parliament’s composition on its various functions.

Pursuant to every analysis that is made on the effect of the doctrine of Separation of Powers on the Malaysian Parliament, relevant reforms will be proposed to strengthen the four versions of Separation of Powers thereby balancing the scale of domination and power between the Legislature and Executive in Malaysia.

The Original Intent of the Reid Commission

The reason behind the Reid Commission's proposal to establish a parliamentary form of government for Malaysia could be discovered if we chart the constitutional history of Malaysia, focusing mainly on the different types of governments that had existed in Malaya before independence. An analysis of the present form of government in Malaysia¹ reveals that the structure is not substantially contributed by the British colonial government but by the historical administration of government of Malaya itself which dates back during the period of the Malacca Sultanate of around 1400A.D.to 1511A.D.²

A comparison between the various types of government that has existed in Malaya^{2a} since the Malacca Sultanate's period up to the present government³ reveals a predominant feature which stands out amongst these governments. The prevailing feature is this; that some of the officials or individual members are simultaneously vested with the legislative and Executive functions.

Malaysia practices a parliamentary form of government which comprises the following elements i.e. :-
that laws are made by the legislature consisting of persons elected by the citizens during elections;
that the executive is not only *[formed by and from the legislature][italics mine]* but is answerable to the legislature and they should be liable to be dismissed if they ever lose the confidence of the elected representatives and
there must exist in the State what is commonly known as "the rule of law".

H Hickling; *An Introduction to the Federal Constitution*; Federation of Malaya Information Service (1960) at p17-18

'In 1509, Albuquerque sent a fleet from Goa which reached Malacca in 1509 and the port was captured by the Portuguese two years later.' R.S. Milne and Mauzy, Diane K., *Politics and Government in Malaysia*, Times Books International (1978) at p10-p11.

Justice Hishamudin bin Mohd Yunus has given an overview of the constitutional history of Malaysia in an article entitled '*An Essay On The Constitutional History of Malaysia*' consisting of two parts. It is found [1995] 3 CLJ, July of 1995.

As proposed by the Reid Commission and modified by the Merdeka Constitution, Colonial Office *Constitutional Proposals for the Federation of Malaya*, Cmnd 210, London: Her Majesty's Stationary Office, 1957 (hereinafter referred to as the 'Government White Paper.')

In view of this fact, it is therefore conceivable that the drafters of the original Malaysian Constitution⁴ may have been influenced by both the political structure of the indigenous society in Malaya and the British colonial government's style of administration.

Before British Intervention

The political system of the Malacca Sultanate, which was adopted by the other Malay states then, including Perak, Selangor and Pahang⁵ was unitary and centralised in nature. The respective Sultans⁶, whose role was only symbolic in nature and to some extent to preserve the unity of the State⁷ headed the political systems of these states⁸. The person who was effectively in charge of and had the political authority in the state was the district chief who was officially appointed by the Sultan. The district chief was appointed to his office by the Sultan by the issuance of a letter of appointment and a gift of a sword as the symbol of his office.⁹ He simultaneously exercised both the legislative and executive functions. As the Executive, the district chief personally exercised the role of

⁴ “One significant point to be remembered here is that the concept of a political unit covering the whole of the Malay Peninsula dates back to the time of Malacca and not just a British creation as have been assumed by some Western writers.” Zainal Abidin Bin Abdul Wahid; *Glimpses of the Malaccan Empire-II* (Ed. Zainal Abidin Bin Abdul Wahid); Dewan Bahasa Dan Pustaka (1970) at p23

⁵ J. Gullick, *Indigenous Political Systems of Western Malaya*, London, Reprint, (1969) at p 7. Kim Wah, Yeo; *The Politics Of Decentralization, Colonial Controversy in Malaya. 1920-1929*, Oxford University Press (1982) at p 4

⁶ ‘The word ‘sultan’ was originally an abstract noun meaning ‘power or authority’ It was then used for provincial and even quite petty rulers who had assumed de facto power alongside the caliph. The word ‘sultan’ has also imported the meaning of a moral or magical authority supported by proofs or miracles which afford the right to make a statement of religious import.’ „C.E. Bosworth et al (Ed)., *The Encyclopedia of Islam* ., Leiden Brill (1997) at p 849.

⁷ Gullick op. cit 5 at p 3.

⁸ In some states, the ruler is called Yang di-Pertuan (He who is made lord) and Raja (Hindu for Ruler); Gullick op. cit 5 at p 44.

⁹ Ibid at p95-96

“As a rule, the territorial chief was the real ruler of the district subject to paying periodic obeisance and annual tribute to the sultan.” Kim Wah, Yeo op. cit 5 at p5.

war leader, tax collector, provider of funds¹⁰ and the local administrator¹¹ who administered the law to preserve order, which was droit administrative¹² in nature. As the Legislature, the district chief exercised his legal authority over the subjects (granted to him by ruler) by creating laws, which prevailed over the village customs.¹³

From a macroperspective viewpoint, the political system of the indigenous community during the Malacca Sultanate period created a cohesion state. The general popular awareness of the masses towards the Sultan as the fount of nobility and the apex of the system united them thereby creating a sense of national solidarity that results in a certain degree of peace and order in the state.¹⁴

Within the state itself however, the ‘real’ and effective authority of the respective districts lie with the districts chief who exercised both the legislative and executive function. Whilst the Sultan had a symbolic and magical role, the district chief was the ‘father of his people.’¹⁵

¹⁰ Gullick op. cit 5 at p 134.

¹¹ Kim Wah, Yeo op. cit 5 at p5

¹² Gullick op. cit 5 at p 115.

¹³ Id at p115

¹⁴ Id at p135-137

¹⁵ Id at p138

During the British rule

When the British intervened in the political affairs of the various Malay states, they too adopted a fused system of government in their administration. This laid the foundations of the system of government that will be seen later in the Federal Constitution.¹⁶

For the states of the Straits Settlement which comprises of Penang (including Province Wellesley), Malacca and Singapore,¹⁷ the British exercised direct rule. A Governor which was appointed by the Secretary of State from London headed the system of administration in the Straits Settlement. Although the Governor was assisted by an Executive Council (which tendered its advice on most official matters) and a Legislative Council (which enacted laws and passed the annual estimates), nevertheless direct control was exercised by the Governor or the Secretary of State over the composition (by retaining an official majority in both bodies) and decisions (by the veto power which the Governor or Secretary of State possess) of the respective organs.¹⁸

Unlike the district chiefs who exercised the legislative and executive functions directly during the Malacca Sultanate, the Governor or the Secretary of State of the Strait Settlements exercised both the functions of the Legislature and Executive indirectly; by dominating the Legislature and Executive in terms of its composition and decisions.

¹⁶ “Politically, a series of administrative changes altered the framework of British Government in Malaya and laid the foundations of a modern state.” Jagjit Singh Sidhu “*The Administrative Development of Malaya, 1896-1941*” (Ed. Zainal Abidin Bin Abdul Wahid); Dewan Bahasa Dan Pustaka (1970) at p72)

¹⁷ Kim Wah, Yeo op. cit 5 at p7

¹⁸ Ibid

The Resident system

Although the British adopted an indirect approach, which was the Resident system in their administration towards the Federated Malay States, comprising of the states of Perak, Selangor, Negeri Sembilan and Pahang,¹⁹ nevertheless this approach bears a striking similarity with the style of governing under the Straits Settlements.

Under the Resident system, the respective rulers of the Malay States had agreed to accept a British Resident ‘whose advice must be asked and acted upon on all questions other than those touching Malay Religion and Custom.’²⁰

Similar to the systems of the Straits Settlement and the Malacca Sultanate, the Resident system is centripetal. While the supreme authority of the respective Malay States remains with the Ruler, the Resident, working under the control and supervision of the Governor in Singapore²¹ became the ‘real ruler of the state’.

The Resident controlled and dominated both the legislative and executive function in the state. In the Executive, the Resident was the chief executive officer; his powers being derived from ‘innumerable enactments’.²² The Resident exercised his executive function by formulating policies, with or without consultation with the Ruler and implementing the same in his state after he has received the Governor’s consent. Furthermore, he also initiated, drafted and personally steered legislation through the state council.²³ Subject to

¹⁹ Kim Wah, Yeo op. cit 5 at pp8-9. See also Jagjit Singh Sidhu op cit 16 at p 72

²⁰ RH Hickling; op cit 1 at p 2. See also Kim Wah, Yeo op. cit 5 at p8.

²¹ E. Sadka, ‘*The State Councils of Perak and Selangor, 1877-1895*’, K.G. Tregonning (Ed), *Papers on Malayan History*, Singapore, 1961, at pp 139 and 155

²² Kim Wah, Yeo op. cit 5 at p9.

²³ Ibid

the supervision of the Governor, the Resident had full control over the state finance, including drafting state estimates.²⁴ He issued executive orders to the District Officers and departmental heads, had virtually absolute control over the subordinate state officers and was empowered to make rules, by-laws and regulations on state matters.²⁵

In terms of his legislative function, the Resident dominated the State Council²⁶ which is the sole legislative organ in the state in terms of its composition and its workings. The Resident nominated the members of the State Council,²⁷ decided on its agenda and sanctioned its decisions. Thus the State Council enacted all laws which were made and tabled by the Resident.²⁸ Furthermore, the State Councils also exercised executive and judicial functions.²⁹

Knowing or unknowingly, the Resident created by the British was a system that was familiar to the community of the Malay states. The Resident had merely replaced the respective district chiefs of the Malay states whilst the nobility of the respective Sultans remained intact.

²⁴ E. Sadka op cit 21 at pp 105-106

²⁵ Kim Wah, Yeo op. cit 5 at p9.

²⁶ “Legislatively speaking, the history of Malaya might be said to begin ... in 1877 with the establishment in Perak, on September 11th of that year of a State Council. This body which originally consisted of the Ruler, the principal Chiefs of the State, several leading Chinese and the ubiquitous British residents, as well as an Assistant Resident, was probably the first formal legislative body for any of the Malay State.” ’ RH Hickling op cit 1 at p5

²⁷ ‘Legislative authority in the State came to be vested in the Ruler in State Council, of which the Resident was always a member.’ RH Hickling op cit 1 at p3. See also Kim Wah, Yeo op. cit 5 at p10.

²⁸ Kim Wah, Yeo op. cit 5 at p10

²⁹ Harding, Andrew, *Law Government and the Constitution in Malaysia*., Malayan Law Journal Sdn Bhd., (1996) at p15. See also Kim Wah, Yeo *ibid*.

As Chandra Muzaffar expressed:

“ When the British imposed the ‘Resident system’ which started in Perak through the famous Pangkor Agreement 1874 and was later adopted in Selangor, Negeri Sembilan [and] Pahang, they did not end the rule of the Sultans. The Sultans remained and so did the relationship between the Sultans and their people. The government was in the name of the Sultan...In fact the British were the ones in control [of the respective Malay states], the Sultans were just puppets [constitutional monarch].³⁰”

Thus the political systems of the Malay states remain intact.

Unification of the Federated Malay States.

The British Government unified the administration of the four Malay States under a British officer, styled the Resident-General. The creation of the Resident General’s position, which was partly intended to relieve the Governor of his onerous duties concerning the protected states, and chiefly to speed up economic development through greater administrative uniformity, economy, and efficiency in a larger political unit in 1895,³¹ did not alter the Resident system drastically. The unified system merely centralised the Executive and Legislative powers of the respective Federated Malay States by transferring them from the respective Residents to the Resident-General.³²

³⁰ Chandra Muzaffar, *Pelindung* ; Aliran Kesedaran Negara (1992) at p60.

³¹ Kim Wah, Yeo op. cit 5 at p11

³² Harding, Andrew op cit 29 at p17

Sidhu³³ explains the same in the following manner :

‘This modified arrangement developed in spite, and not because, of the Treaty....made no effort to define the division of powers...the Resident-General, by virtue of his control over the Residents, became the virtual head of all State governments...’³⁴

When the Treaty of Federation,³⁵ was implemented, the government was not only administered ‘under the advise of the British Government” via the Resident-General, (who was an agent and representative of the British Government working under the Governor of the Straits Settlement and who’s advice must be followed by the Rulers of the four Federated Malay States ‘in all matters of administration other than those touching on the Muhammadan Religion’³⁶), in addition, state budgets and draft legislation of the respective State Councils must also receive the consent of the Resident-General and the Governor before it is passed.³⁷

The introduction of the Federal Council in 1909³⁸, it did not alter the style of administration in any way, that is, the Resident General continued to exercised and control both the Legislative and Executive bodies in the Federated Malay State. The Federal Council instead centralised the legislative powers of the Federated Malay State and allowed the Resident General to dominate the Rulers in terms of its composition and administration in its legislative role.³⁹

³³ Sidhu,J.S., *Administration in the Federated Malay States*; Kuala Lumpur, OUP (1980)

³⁴ Ibid at p55-56

³⁵ Treaty of Federation 1895

³⁶ RH Hickling op cit 1 at p3

³⁷ Harding, Andrew op cit 29 at p17

³⁸ Kim Wah, Yeo op. cit 5 at p15

³⁹ Ibid

The system of the Unfederated Malay States.

The Unfederated Malay States has an administrative structure similar to the Federated Malay States. Instead of the Resident and later Resident-General who held the executive and legislative functions in the Federated Malay States, the Ruler-In Council constituted the crucial component of the official machinery of the Unfederated Malay States.

The Ruler –In-Council or State Council whose members were appointed by the Sultan as its chairman exercised legislative, financial and executive powers.⁴⁰ As an Executive organ, the State reviewed, changed and approved decisions of the British Advisor, the Ruler, the Mentri Besar and the Malay Secretary and it also generally controlled the utilization of state funds.⁴¹

In its legislative role, the Ruler- In- Council or State Council was the sole legislative body passing enactments, making rules, regulations, notifications and passing state estimates.⁴²

⁴⁰ Kim Wah, Yeo op. cit 5 at p21

⁴¹ Ibid

⁴² Ibid

The Malayan Union 1946

In essence, the Malayan Union was established to centralise the administration in Malaya.

In view of the fact that the tripartite system of federated, unfederated and colonial territories had create an administrative headache which had prevented Malaya from defending herself and an obstacle to Malaya's independence,⁴³ logically therefore the Malayan Union was create to unite Malaya so that she could defend herself and achieve her independence.

The constitutional structure of the proposed Malayan Union, which failed even before it could successfully take off in its operation, was similar to the administrative systems practised in Malaya before this.

The Malayan Union established two separate institutions i.e. the Executive Council and the Legislative Council. Although these bodies are institutionally separated, nevertheless the composition of the Executive and the Legislative Council were the same. The Governor and three ex-officio members would sit in both the Executive and Legislative Council, thus exercising dual functions.⁴⁴

⁴³ Harding, Andrew op cit 29 at p 21

⁴⁴ Harding, Andrew op cit 29 at p 22

The Federation of Malaya Agreement 1948

The system of government which was adopted by the Federation of Malaya Agreement 1948 ('the Agreement')⁴⁵ also bears the hallmark of the Malacca Sultanate's political structure and the political structures mentioned hereinabove.

The Agreement established two main federal institutions; which were the Federal Executive Council and the Federal Legislative Council.⁴⁶ Although structurally, the two institutions were separated, the same officials make up the composition and dominated the proceedings in both the institutions.

The High Commissioner dominated the Federal Executive Council, which comprised of the High Commissioner himself, Chief Secretary, Attorney General, Financial Secretary as ex-officio members and between twelve to twenty four members, appointed by the High Commissioner.⁴⁷ Although by convention the High Commissioner does not make major policy changes without the consent of all the State Governments, nevertheless he was legally empowered to act in opposition to the advice of the Federal Executive Council.⁴⁸

In the Federal Legislative Council, the High Commissioner sits as the Chairman with the same three ex-officio members, the President for the time being of each Council of State and one representative of each of the Settlement Councils together with eleven Official Members and fifty Unofficial Members.⁴⁹ In terms of domination, the High

⁴⁵The Agreement came into existence on February 1st 1948; RH Hickling op cit 1 at p10

⁴⁶ RH Hickling op cit 1 at p11

⁴⁷ Ibid

⁴⁸ Harding, Andrew op cit 29 at p 26

⁴⁹ Ibid

Commissioner was empowered to veto bills that were passed by the Legislative Council.⁵⁰

After having analysed all the different types of government that has existed in Malaya, it is submitted that a dominant feature prevails in all these governments; that is the legislative and executive functions are always embodied in one man be it the Sultan, district chiefs, Governor, Resident, Resident-General, Ruler-In-Council or High Commissioner.

Reid Commission Report 1957 and the Government White Paper

In view of the common feature which appeared amongst the different constitutional structures adopted during the different periods of Malaysian history,⁵¹ it was therefore not surprising that the Reid Commission recommended a parliamentary form of government⁵² when they were given the mandate by the colonial government⁵³ to among others “...make recommendations for a federal form of government for the whole country

⁵⁰ The Commissioner had reserved powers to refuse assent of bills passes by the Legislative Council and to declare that a bill before the Council should have effect. Ibid

⁵¹ The Reid Commission made the following comments which indicated that they may be aware of the system of government which Malaya was familiar with and may have taken into account of when they were making their recommendations:

“ We must start from the present position as we find it, taking account not only of the history and tradition of Malaya but also of existing social and economic conditions. Much that is good has already been achieved and we would not seek to undo what has been done.” Reid Commission op cit 53 at para 14, at p4

⁵² “ We recommend (Art.35) that it should be the responsibility of the Yang di-Pertuan Besar to appoint the Prime Minister of the Federation. The Prime Minister must be a member of the House of Representatives.....It will then be for the Prime Minster to choose the Ministers who should be appointed. Ministers must be members of either the Senate or the House of Representatives at the time of their appointment....” Id para 68 at p26

⁵³ The Reid Commission was appointed in the name of Her Majesty the Queen and Their Highnesses the Rulers after a conference was held in London early in 1956. Para 1 and 3 of the *Federation of Malaya Constitutional Commission, 1956-1957*;Colonial No. 330,London: Her Majesty’s Stationary Office, 1957, *Reid Commission Report 1957*.

as a single, self governing unit within the Commonwealth based on Parliamentary democracy with a bicameral legislature...”⁵⁴

Andrew Harding⁵⁵ however offered another reason to support the Reid Commission’s proposal of a parliamentary government. He reasoned that because the members of the Commission came from a Commonwealth background, it was inevitable that they would suggest a ‘Westminster-style’ executive’ form of government.⁵⁶

Irrespective of the reasons offered, the fact remains that the parliamentary form of government suggested by the Reid Commission bears a strikingly close resemblance to the forms of government adopted in Malaya because the Executive which is the Prime Minister and his Cabinet are formed from the Legislature, which is Parliament. This allows the Prime Minister and his Cabinet to exercise both the executive and legislative functions simultaneously. Lord Hailsham has admitted that he was tempted to label the parliamentary form of government as the ‘executature’ where the powerful branch of the Government virtually exercises both the legislative and executive functions simultaneously⁵⁷. This structure of government that was adopted almost entirely by the Government White Paper that formulated the Merdeka Constitution⁵⁸ is found in the present Article 43⁵⁹ of the Federal Constitution today.

⁵⁴ Id. para 3 at p2

⁵⁵ Harding, Andrew op cit 29

⁵⁶ Ibid at p32

⁵⁷ Lord Hailsham., *The Independence Of The Judiciary In A Democratic Society*, [1978] 2 MLJ cxv at p cxvi

⁵⁸“It is proposed to accept the recommendations of the Commission with regard to the Federal Legislature, subject to amendment of point of detail and subject to an increase in the number of nominated members of the Senate from eleven to sixteen....” Government White Paper op cit 3; para 20 at p7.

⁵⁹ “The Cabinet shall be appointed as follows, that is to say:

- (a) the Yang di-Pertuan Agong shall first appoint as Perdana Menteri (Prime Minister) to preside over the Cabinet a member of the House of Representative who is his judgement is likely to command the confidence of the majority of the members of that House; and
- (b) he shall on the advice of the Prime Minister appoint other Menteri (Ministers) from among the members of either House of Parliament:.....” Article 43(2) Federal Constitution

Although the Westminster style of parliamentary government may be familiar to Malaya, nevertheless the Reid Commission has failed to consider the impact of political parties⁶⁰ on the Westminster style of government even though political parties had played an active and dominant role in the events leading up to the independence of Malaya. The dominance and active participation of the political parties in Malaya can be evidently seen in the following situations:-

- (a) Even before Malaya achieved her independence, that is as early as 1952 when the municipal elections were held in Kuala Lumpur⁶¹ and later in 1955, the political scene in Malaya was already dominated by political parties. In the 1952 municipal elections in Kuala Lumpur, the newly formed partnership of United Malay National Organisation (UMNO) and Malayan Chinese Association (MCA) had defeated the Independence Malaya Party by nine seats to two whilst the Alliance party (which was the combination of the UMNO, MCA and Malayan Indian Congress (MIC)) had won in a number of local elections.⁶²
- (b) When steps were taken towards giving Malaysians more political responsibility by introducing the 'member' system in the Legislative Council in 1952, it was the political party that was Alliance then which fought for and obtained a compromise

⁶⁰ There were several evidences, which indicated that political parties in Malaysia played a vital and active role in events leading to the independence of Malaya. The political parties' involvement included their meeting in the Constitutional Conference in London as early as 1956 to decide whether Malaysia should become a self-governing nation. When the Reid Commission conducted its investigation in preparation for the Federal Constitution they consulted amongst others the political parties (Alliance then). Milne R. S. and Mauzy K. Diane op cit 2 at p 36-37.

In spite of their active involvement and Commission's knowledge that the political parties would finally dominated the Malaysian Parliament, their existence were not mentioned at all in the Federal Constitution

'It is 'parliamentary', ...in that Ministers, or Cabinet, sit in the legislature and are responsible to it. In fact, *although this is not laid down in the constitution, the Ministers belong to the political party (or parties)* [italics emphasize] which can secure a majority of seats in the lower house of the legislature.' Ibid.

⁶¹ Milne R. S. and Mauzy K. Diane op cit 2 at p35

⁶² Ibid

from the British government. The compromise resulted in the High Commissioner being compelled to consult the leaders of the elected majority before he makes any nominations. At the first general elections in 1955, the Alliance party won fifty one out of fifty two seats.⁶³

(c) The political parties' were also involved in the meeting of the Constitutional Conference in London as early as 1956 to decide whether Malaysia should become a self-governing nation. Thus the representatives of the then Alliance party and the Rulers were present at the conference.⁶⁴

(d) Finally when the Reid Commission was set up to draw up the draft constitution for the newly formed independent Malaya, the Reid Commission had in fact taken an exceptional importance to the submission given by the political parties in particular the Alliance in view of its prospective role as the future government of Malaya.⁶⁵ In fact, the Reid Commission was particularly 'indebted to the parties of the Alliance for their memorandum and to the Alliance leaders who gave [them] supplementary explanations of it.'⁶⁶

By adopting the structure of the Westminster style of Parliamentary government merely because it is similar to the political structure of Malaya then without considering the presence and dominance of centralised political parties whose foundations are built on the protection of their respective races and where almost all of the political parties practices strict discipline on its members, the Westminster style of parliamentary government has created the best form of government for a political party to dominate both the Executive

⁶³ Id at p36

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Reid Commission op cit 53 at Para 9

and Legislature.⁶⁷ The combination of centralised political parties on a Westminster style of parliamentary government has effectively weakened the various versions of the doctrine of Separation of Powers. In the next chapter, we will look into the structures and historical development of the political parties.

⁶⁷ 'To mimic the Westminster type of democracy in the [*Malaysian*][italics mine] constitution without comparative economic and social foundation is to court self- destruction.' Minister of Home Affairs Malaysia, on the *Constitutional Amendment 1971*, *Straits Times*, 7/3/1971.

Structures and Historical Development of Political Parties

The operation of a parliamentary form of government will not be fully portrayed if the explanation of its operation is only confined to the traditional theory of constitutional law without any reference to the part played by political parties.¹ This is especially true in the context of the Malaysian Parliament where political parties had constantly played an active part in the political arena of Malaysia even before Malaysia achieved her independence.^{1a}

In view of the important role which political parties play in the Legislature, it is therefore pertinent that we examine the structural organisations and historical origins of political parties that exist in a state. The various structural organisations that exist within the political parties and their historical origins may either strengthen or weaken the doctrine of Separation of Powers that exist between the Legislature and Executive.

Based on this premise, this chapter is divided into three parts. Firstly, Part A seeks to discover and analyse the different structural organisations of political parties from different countries. In this context, the political parties of the United States (US) and the United Kingdom (UK) will be examined and analysed. In Part B of this chapter, an examination will be conducted on the historical development of the political parties in the US and the UK. Finally in Part C we will examination and analyse the structural organisations and historical development of the political parties in Malaysia. In the following chapters, an attempt will be made to analyse the impact of political parties on the doctrine of Separation of Powers.

(A) Structures of Political Parties

The different structures that exist within the political parties are important in relation to the doctrine of Separation of Powers since their structures may either strengthen or

¹ Duverger, Maurice *Political Parties, Their Organisation And Activity In The Modern State*; Methuen & Co. Ltd (3rd Ed)(1964) p 353

^{1a} See Supra Chapter entitled *The Original Intent of the Reid Commission*., footnote 60-65.

weaken the doctrine that exists between the Legislature and the Executive. The different organisational structures that a political party chooses to adopt may either produce a strong and influential political party which is able to dominate its members, thereby weakening the doctrine of the Separation of Powers or a weak political party in terms of its dominance and influence over its members. This will conversely strengthen the Separation of Powers in all its versions.

Political parties are generally categorised into the following structures, that is caucus or branch, cadre or mass based and centralised or decentralised.

(1) Caucus and Branch

The basic element, which forms a political party, may generally be divided into four main types i.e. the Caucus, the Branch, the Cell and the Militia.² For purposes of this dissertation, only the first two (i.e. the Caucus and the Branch) are relevant for our discussion.

A “caucus” party is a product of profound individualism. It consists of a small number of members, comprising of notabilities chosen more for their capabilities (or ‘expertise’) rather than their personal influence. Causes are semi permanent; they do not plan to seek any expansion of their members and they are not ideological groups, nor class communities. Their members comprise of teams of experts, which are united for a specific cause i.e. usually to win votes and administrative posts.³

Because individualism dominates a caucus type political party, it is submitted that such organisations are collectively weak and they are dominated mostly by individual considerations. Political parties in the United States would seem to mirror such characteristics where the political parties are merely electoral machines, established to

² Duverger, op cit., 1 at p 17

³ Id. p18

ensure the nomination of the candidates. These political parties are comprised of small well-known people whose personal influence would count more than their numbers.⁴

Because 'caucuses' type political parties focuses on individualism rather than the political party's organisation, the successful member will be able to take a stand independent of his political party even though the Executive and Legislature are composed of members from the same political party. This will strengthen the doctrine of Separation of Powers in particular 'the common interest version', 'the accountability version, 'Rule of Law version' and 'balancing version'.⁵

Conversely, political parties of the 'branch' type are more centralised and organised⁶, which are their hallmarks. Unlike caucuses, the branch appeals to masses; it is permanent and it frequently organises meetings to educate its members with political education. In contrast with caucuses type parties, which relies on the capability and influence of its leaders or nominees, the leaders or nominees of the branch are elected (or 'controlled) by the members.⁷

Political parties of the 'branch' type, which are more organised and centralised maintain more control over their leaders and members, who may eventually form the members in the Legislature and Executive. Unlike political parties of the 'caucus' type, political parties of the 'branch' type weakens all but the 'efficiency' version of the doctrine of Separation of Powers. This is because the success and continued existence of the members in the Legislative and Executive branch of the state are heavily dependent upon the political parties. The political parties in such situations therefore exercise an indirect control over Legislative and Executive branch simultaneously.

⁴ Id. p20-22. American parties can be considered as formed on the basis of the caucus.

⁵ Supra chapter 1

⁶ Duverger, op cit, 1 at p23

⁷ Id 40 p 24

(2) Cadre and Mass based parties

The other type of classification between the various political parties lies in the number of members a political party possesses. In short, the distinction between cadre and mass based parties are found in the size of their membership.

The fundamental activity of mass based parties is in recruiting members of whom they depend on for support and finance. In exchange, they educate their members by conducting political education in various branch meetings.⁸

To obtain the support of its members, mass parties require its members not only to enroll with the parties but also to declare their agreement to the party's doctrine, usually by a personal pledge to observe the rules of the party and the payment of subscription.⁹

The requirements that are imposed by the mass based parties it is submitted physically and psychologically restricts the freedom of speech and expression of their members as individuals. These restrictions will be shown in the subsequent chapters entitled *Parliament's Composition – A critical analysis of the Dewan Rakyat, Parliament's Composition - A critical analysis of the Dewan Negara (Senate) (Article 45), Parliament's Composition – Criticisms on the methods of disqualification, Law Making Function – A Critical Analysis and Parliament's role in scrutinising the Executive.*

The indirect control which mass based political parties possess over its members in both the Legislative and Executive branch theoretically weakens all but the 'efficiency' version of the Separation of Powers. Since members of both the Legislature and Executive are dependent upon the same source, i.e. the political party,

⁸ Duverger, op cit, 1 at p63

⁹ Duverger, op cit, 1 at p71

it is submitted that each branch will not exercise an independent scrutiny upon the other for fear of the possible sanctions that the political party may impose.

Since individualism is the hallmark¹⁰ for cadre type parties, the support to the party bears a different meaning. Unlike mass parties, the decision to support the party is a personal act based on the aptitudes and/ or particular circumstances of the person, determined strictly by individual qualities¹¹. Moreover, the majority of society are merely supporters (they only lend their support but remain outside its organisation) of the respective cadre parties as opposed to being members. For example, in the United States and Canada only a small fraction that is between two and five percent of the population formally belong to one of the political parties in the sense of actually being members of one of the local clubs or organizations. Although most of the population do, in fact, identify with one of the parties and call themselves (in the United States) Democrats or Republicans and they may even be formally registered as a Democrat or a Republican and vote in the party's elections, however they are not formally registered as members of the political parties.¹²

Since cadre parties generally correspond to decentralised independent caucuses type parties, these political parties are generally weak in terms of their influence and domination over their party members. This theoretically strengthens the doctrine of Separation of Powers in all its versions. On the other hand, mass based political parties being centralised branch parties,¹³ conversely weakens the doctrine of Separation of Powers because these political parties have more control and dominance over their members.

¹⁰ Id at p37

¹¹ Duverger, op cit, 1 at p64

¹² Grolier at <http://gi.grolier.com/presidents/ea/side/polparty.html>.

¹³ Duverger, op cit, 1 p 67

(3) Centralisation and Decentralisation

The final classification between the political parties lie in their organisations. A political party with a centralised organisation strengthens the party whilst conversely a decentralised political party may weaken the party.

Unlike autocratic centralised political parties who rely on their superiors to make decisions and would later compel all members to follow the decisions strictly once it is made, democratic centralism presupposes that free discussions had taken place at the grassroots level and that the leaders had taken into account their opinion before the decisions were made.¹⁴

On the other hand, decentralisation weakens the party because the 'heart' of the party has very little control over its members in terms of decisions since local leaders are given wide discretion to decide on its members, decisions and how they should be implemented.¹⁵ Unlike, centralised political parties, where discipline is exercised at a vertical level, discipline of decentralised political parties are powerful only at the local level; it becomes weaker at the state level and is practically non existent at the national level.¹⁶

Political parties in the United Kingdom i.e. the Conservatives and Liberals would reflect the centralised and rigid regime whereas political parties of the United States seem to fall within the category of decentralised political parties.¹⁷

In relation to the doctrine of Separation of Powers, it is submitted that decentralised political parties which practices dispersal of powers within its organisation whereby each tier in its organisation is independent of the other strengthens all the versions of

¹⁴ Id p 56-58

¹⁵ Id p 53

¹⁶ Maurice Duverger, *Party Politics and Pressure Groups. A Comparative Introduction* (Ed. K.W. Watkins)(1972) p7-p9

¹⁷ Id p 7 & p 9

the Separation of Powers. Conversely, centralised political parties which practices a centripetal and rigid form of organisation allows the political parties to indirectly control its members in both the Legislature and Executive thereby weakening all but the 'efficiency' version of the Separation of Powers.

(B) Development of political parties in the United Kingdom and United States

According to Maurice Duverger¹⁸, the political parties of Europe which originated primarily from class conflict; was later developed into an ideological conflict.¹⁹

The class struggle which existed then had a dual nature; firstly between the bourgeoisie and the aristocracy and secondly between the socialist and the capitalist. These various struggles found its expressions in the form of political parties i.e. the conservative parties, liberal parties²⁰ and socialist parties²¹. The class struggle that existed in the United Kingdom resulted in the formation of the Conservative Party, Liberal Party and Labour Party.

Unlike their European counterparts, it is submitted that the existence and development of political parties²² in the United States were established from disputes concerning various issues. Political parties of the United States were, in short, "issue based", i.e.

¹⁸Duverger, Maurice; *Party Politics and Pressure Groups. A Comparative Introduction*(Ed. KW Watkins)(1972) p 41

¹⁹ Ibid

²⁰ In Great Britain the bourgeoisie comprising primarily of the industrial, commercial and intellectual sections of society was represented by the Liberals whilst the Conservative Party represented the traditional aristocratic class. Similar groups can be found in German cities, Switzerland and France; Id. p 42-43

²¹ The socialist parties viz Labour Party in its early days represented the working class with a socialist ideology. It was developed as a result of discriminatory master-servant laws amongst others ie a conflict between a dominated social class and a dominant social class. Other socialist doctrines that were formulated included Marx, Engles, Lenin and Stalin. Id p 48

²² " The list of American major parties is short and select. In almost 200 years of history, only five political parties have achieved a competitive position in American national politics, ie Federalists party, the Jeffersonians, The Democrats, The Whigs and The Republicans. Three lost it; only the Democrats and the Republicans maintained it to this day." Sorauf and Beck; *Party Politics in America* (6th Ed); Scott, Foresman and Co (1988).p 36.

they existed to champion several issues which were faced by the Americans at different phases of time.

The Republican Party in the United States was historically formed to oppose slavery (which was an issue then). Its influence later spread to the North.²³ Later in history, the Republican Party defended the “big business” or the commercial interest (mostly coming from the northern and costal parts); that is, the most dynamic and spectacular successful minority in the American society. It was also known as a party focused at organising elections to control the presidency,²⁴ which also happens to be an issue in American politics.

Conversely, the Democrats,²⁵ were established amongst others to oppose issues like commercial goals, national banking and high tariffs; it also defended the new immigrants and opposed nativist opposition to them.²⁶

After examining the different developments of political parties in the Western world, it is submitted that the political parties in both Europe and the United States were developed as a result of class and or issue based conflict that had existed within their respective society. The issue of race was imbued within and had formed part of these two categories of conflicts.

²³ Sorauf and Beck; *Party Politics in America* (6th Ed); Scott, Foresman and Co (1988).
See also Bowels, Nigel; *The Government and Politics of the United States* (Ed: Vincent Wright) (1994); Macmillan Press p 21-23

²⁴ H.H. Schattschneider, *United States: The Functional Approach to Party Government* (Ed. Sigmund Neumann; *Modern Political Parties. Approaches to Comparative Politics*)(1956)
p 197-198

²⁵ It grew out of the Jacksonian wing of the Jeffersonian party. See supra 23 at p 37

²⁶ Supra 23 p 37

(C) Political parties in Malaysia

After having examined the various types of political parties and their different organisational structures, it is submitted that structurally, all major political parties in Malaysia adopt the model practiced by the political parties in United Kingdom; that is, the political parties of Malaysia have mass based membership having a centralised branch structure. Such a structure, it is submitted is "unitary or triangular" in nature.

Within the core parties of the National Front, that is, the United Malays National Organisation (UMNO), Malaysian Chinese Association (MCA) and Malaysian Indian Congress (MIC), the branch forms the basic unit or the base²⁷ of these parties. In all these parties, the branch effectively penetrates into the rural villages and mass population. The political parties also have mass membership. At a level above, lies the respective district organisations or divisions of the respective core political parties. It is a usual practice to have one division to cover one or more constituencies, its purpose being to promote efficiency and unity within the respective parties.²⁸ All these district organisations would come under the supervision and coordination of their respective State Committees, which are the State Liaison Committees²⁹ for UMNO, MCA and the MIC. Finally, at the apex, sits the national organisations of the respective political parties. They are represented by the Supreme Executive Council³⁰ of UMNO, which is the primary decision making body and power center of the party comprised of elected national officeholders (ie elected President, deputy president, five vice-president, an appointed Secretary-General, Treasurer, and Publicity Chief)

²⁷ For UMNO, MCA and MIC the branch was their basic unit. See Diane K. Mauzy, op cit, 70 at p8 and 11. See also R.S.Milne and Diane K. Mauzy, op cit 57 at p132- p134.

²⁸ Diane K. Mauzy, op cit, 70 at p8 and 11. See also R.S.Milne and Diane K. Mauzy, op cit 57 at p133. See KJ Ratnam and RS Milne op cit 44 at p 33 and 37

²⁹ In UMNO, the State Liaison Committee is headed by a chairman appointed by the Supreme Executive Council. . See R.S.Milne and Diane K. Mauzy, op cit 57 at p132 and 174. In the MCA, the State Assemblies (later State Liason Committees) has the similar power as that in UMNO and so is the structure of MIC. See Diane K. Mauzy, op cit, 70 at p11 and 12. See also R.S.Milne and Diane K. Mauzy, op cit 57 at p175 and 135.

³⁰ See Diane K. Mauzy, op cit, 70 at p8. See also R.S.Milne and Diane K. Mauzy, op cit 57 at p132.

and those elected directly by the General Assembly; the Central Committee³¹ of the MCA which is the General Working Committee (later called the Central Committee) comprising of members elected by the General Assembly and those appointed by the President and the Supreme Council³² of the MIC which is the major policy making organ of the party having its members appointed by the General Assembly. The national organisations of the respective political parties are headed by their respective Presidents. It is submitted that based on the description given above, the main component parties in the National Front are unitary and structurally centralised.

Not only are all the three main component political parties structurally of the branch, centralised type, they are also acutely centralised in terms of their powers.

In UMNO, the amendment to the party's constitution in 1955 and 1970 had effectively gravitated towards centralisation of powers in the Supreme Executive Council. Pursuant to the party's constitutional amendment in 1955, the State Executive Committees was replaced by less powerful State Liaison Committees, having a chairman appointed by the Supreme Executive Council. Furthermore, the divisions will now have to deal directly with the national headquarters.³³ The amendments to the party's constitution in 1970 included the holding of UMNO's party elections every three years instead of annually, measures for stricter party discipline and the selection of parliamentary and state party candidates by the Supreme Executive Council.³⁴

³¹ The most powerful policy-making body is the General Working Committee (later called the Central Committee); comprised of members elected by the General Assembly and those appointed by the President. See Diane K. Mauzy, op cit, 70 at p11. See also R.S.Milne and Diane K. Mauzy, op cit 57 at p134.

³² The Supreme Council is the major policy making organ of the party and the General Assembly appoints its members. The President heads the Supreme Council. Virginia H. Dancz, *Women and Party Politics in Peninsular Malaysia*, Oxford University Press (1987) p132.

³³ R.S.Milne and Diane K. Mauzy, op cit 57 at p132.

³⁴ These were passed in 10 May 1971 See *Straits Times (Malaysia)*, 8 and 10 May 1971. There however were accusations that the amendments were an attempt to take power away from the party divisions and branches. R.S.Milne and Diane K. Mauzy, op cit 57 at p174

Similarly for the MCA, amendments to the party's constitution in 1959³⁵ had effectively transferred more powers to the President and in turn concurrently reduced the powers of the State Liaison Committees.³⁶

UMNO, MCA and MIC together with the other component parties³⁷ later formed a grand coalition called the National Front (Barisan Nasional). Structurally, the National Front is also centralised with the respective component parties acting as its branch.

At the apex of the National Front stands the National Supreme Council (Dewan Tertinggi)³⁸ which is the primary decision making body, with powers to select candidate, initiate policies, recommend disciplinary measures and to select chief party administrators.³⁹ This national body comprises of representatives of the various coalition parties. Below the National Supreme Council lie the respective state and divisional coordinating committees, which are empowered to establish branch committees.⁴⁰ These divisional and branch committees are established only to serve as forums of inter-party dialogue between the various component parties.⁴¹ Since the National Front is semi- institutionalised, comprising of a coalition of political parties,

³⁵ The amendments were done because certain powerful and self-perpetuating cliques had come to dominate certain states and damaged the popularity and internal unity of the party. KJ Ratnam and R S Milne, op cit 44 at p37

³⁶ R.S.Milne and Diane K. Mauzy, op cit 57 at p175 and Diane K. Mauzy, op cit 70 at p11.

³⁷ The original nine political parties in the Barisan Nasional were UMNO, MCA, MIC, PAS, PPP, Gerakan, SUPP, Parti Pesaka Bumiputera Bersatu (PBB) and the Sabah Alliance Party. Diane K. Mauzy, op cit, 70 at p 77

³⁸ R.S.Milne and Diane K. Mauzy, op cit 57 at footnote 269 of p190

³⁹ R.S.Milne and Diane K. Mauzy, op cit 57 at p130. Tun Razak noted that the National Front was not much different from the Alliance Party, only larger; *Pelopon* (UMNO Publication), No.3(1975), pp.15-16

⁴⁰ R.S.Milne and Diane K. Mauzy, op cit 57 at p202 and Diane K. Mauzy, op cit, 70 at p99

⁴¹ Diane K. Mauzy, op cit, 70 at p 98

the identity and structures of the respective component parties within the coalition remains intact.⁴²

Within the National Front itself the dominance of UMNO vis a vis other political parties is more pronounced.⁴³ In practice, UMNO's position as the senior partner in this coalition is implicit between the main component parties.⁴⁴ The dominance of UMNO is manifested in many ways: - they include the fact that UMNO would always have the largest number of Parliamentary seats, UMNO would produce the top Cabinet post i.e. every Prime Minister and Deputy Prime Minister comes from UMNO and UMNO is clearly recognised as the most powerful and influential party whose leadership determines the direction and it sets the pattern and conditions of multi racial accommodation⁴⁵ of both the party and government policies

In respect of the political style, the National Front has since the time of the Alliance been largely dependent on the autonomy of the elites. The practice of elite accommodation and compromise, that was practised by the Alliance (where intense bargaining was conducted behind closed doors in an atmosphere of trust and accommodation) continues in the National Front. The style of the Alliance which is now adopted by National Front was described as a 'mutual deterrence model of conflict management.'⁴⁶ In terms of policy making within the National Front today, UMNO plays a more dominant role in deciding government policies, though in practice it is usually done in consultation with other component parties. Such style of governing was practised even during the time of the Alliance, while UMNO's

⁴² Diane K. Mauzy, op cit, 70 at p 99. Because of the Barisan National's structure, which is semi-institutionalised, it is possible and in fact "there has been considerable movement of individuals and peripheral parties, in and out of the coalition without upsetting the basic structure." Diane K. Mauzy, op cit, 70 at p 139

⁴³ R.S.Milne and Diane K. Mauzy, op cit 57 at p191.

⁴⁴ KJ Ratnam and RS Milne, *The Malayan Parliamentary Election of 1964.*, University of Malaya Press.,(1969 Reprinted). UMNO's supremacy was understood by its partners, but the MCA and the UMNO top elite did not want any obvious public demonstration. Diane K. Mauzy op cit. 70 at p23-p24.

⁴⁵ R.S.Milne and Diane K. Mauzy, op cit 57 at p217

⁴⁶ Secrecy was a key rule of the Alliance, now National Front style. See R.S.Milne and Diane K. Mauzy, op cit 57 at p133. Esman, Milton J., *Administration and Development in Malaysia: Institution Building and Reform in a Plural Society*, Ithaca, New York (1972) at p 261

supremacy then was acknowledged within the Alliance. Nevertheless the non-Malay partners could drive hard bargains and there could be concessions.⁴⁷

Once a decision is made by the elites within the National Front, all the component parties must defend it,⁴⁸ although it might be disadvantages to one of the community.⁴⁹ Reflecting a centralised mass based party, the elites of the respective component parties are expected to ensure that the members, that is the non-elites, defend such policies or decisions which were reached. This process was explicitly described by Dr. Mahathir Mohamed as follows;

“ This sort of thing that has to percolate from the top. It will be a case of the top leadership convincing the lower rungs of the leadership, and then slowly perhaps it might get down to the bottom.”⁵⁰

Within the major opposition parties in Malaysia, the structures within these parties are similar to the major component parties in the National Front.

The basic unit for Partai Islam Se Malaysia⁵¹ is the sub-branch, followed by the branch. At the state level stand the State Liaison Commissioners, appointed by the President on the advice of the National Executive Committee. In practice, most of the powers to exercise policy-making decisions are done by the National Executive Committee. At the top of the hierarchy are the President, Deputy President and the Vice President of the party⁵². Although decisions within the party follow an Islamic tradition, which calls for full consultation, they do not bind the President, who could actually act unilaterally as he wishes.⁵³

⁴⁷ Diane K. Mauzy, op cit, 70 at p137 and p140. Interview with Tunku Abdul Rahman (May 7, 1975).

⁴⁸ Decisions of the Supreme Council require unanimity. See Diane K. Mauzy, op cit, 70 at p99

⁴⁹ Diane K. Mauzy op cit 70 at p23.

⁵⁰ Dr. Mahathir's observation on the UMNO-PAS cooperation: *Pelopon*, No 3(1975), pp 15-16 (UMNO Publication).

⁵¹ PAS

⁵² R.S.Milne and Diane K. Mauzy, op cit 57 at p144

⁵³ R.S.Milne and Diane K. Mauzy, op cit 57 at p145

Similarly for the Democratic Action Party⁵⁴ it is organised by branches at the base. At the top, the party's executive body is the Central Executive Committee of which its most important position is the Secretary-General.⁵⁵

In view of the fact that almost all of the members in the Malaysian Parliament belong to political parties which are organised along the mass membership centralised branch structures, it is submitted that the dominant element which effectively controls both the Legislature and Executive is the political party. The large degree of control and dominance which is exercised by the political parties had prevented the growth of all but the 'efficiency' version of the Separation of Powers, which exists between the Legislature and Executive in the Malaysian Parliament, from flourishing.

The political parties in Malaysia do not only derived their strength from their organisational structures, they also obtained their strength from the support of their respective communities. Unlike western political parties represented by the United States and United Kingdom respectively, almost all the political parties in Malaysia were established to protect the interests of the different communities that had existed in Malaya then. Again unlike the western countries, for example, the United States and the United Kingdom, where the issue of race merely formed part and parcel of their class conflicts, the issue of race played a pivotal role in the political landscape of Malaysia.

Even before independence, Malaya consisted of various and diverse communities.⁵⁶ In view of such a mosaic make up, communalism has always been a prominent feature in the Malayan and now Malaysian political scene. As R.S. Milne writes;

"More than anything else, the racial composition of Malaysia is the key to understanding the whole picture. It dictates the pattern of the economy, has

⁵⁴ DAP

⁵⁵ R.S.Milne and Diane K. Mauzy, op cit 57 at p153

⁵⁶ An insightful explanation on the history and nationalism of the major races (Malay, Chinese and Indians) in Malaya before pre-independence can be seen in K.J. Ratnam's book entitled "*Communalism and the Political Process in Malaya*"; University of Malaya Press (1965).

helped to shape the Constitution and has influenced the democratic process and the party system.⁵⁷,

As such, associations and communal bodies were formed originally to protect the interests of the respective community. Most of these associations and communal bodies slowly evolved and were finally developed into established political parties, as we now know them today, that being, UMNO, MCA, MIC, PAS and DAP.

The United Malays' National Organisation (UMNO) being a communal organisation was established exclusively to protect and preserve the position and claims of the Malay community.⁵⁸ It strove to exert the rights of the Malay community, which it claimed was lost through the establishment of the Malayan Union. It was claimed by UMNO that the Malayan Union had amongst others diluted the sovereignty of the Malay Rulers. Furthermore, the Malayan Union had also improved the position of the non-Malays politically by granting them citizenship, voting rights and access to some branches in the civil servants, which were not granted to them previously.⁵⁹ The challenges mounted by UMNO had not only enabled the party to successfully unite the entire Malay community,⁶⁰ but it had also revitalised Malay nationalism.⁶¹ UMNO thus was seen as the protector of the Malay community with the clarion call entitled 'Hidup Melayu' which was later altered to 'Merdeka.'⁶²

⁵⁷ RS Milne and Diane K. Mauzy, *Politics and Government In Malaysia*; Federal Publications (1978) p 125. See also K.J. Ratnam, *Communalism and the Political Process in Malaya*; University of Malaya Press (1965). p142. R.S. Milne, *Government and Politics in Malaysia*, the University of British Columbia; Houghton Mifflin Company. p 3

⁵⁸ K.J. Ratnam, *Communalism and the Political Process in Malaya*; University of Malaya Press (1965). p 145.
"The underlying axioms upon which all UMNO policy is based are UMNO political dominance and Malay unity." RS Milne and Diane K. Mauzy, *Politics and Government In Malaysia*; Federal Publications (1978) p 133

⁵⁹ The Malayan Union planned to establish a new type of government in Malaya. The provisions, which drew opposition from the Malay community amongst others, include a move towards direct rule by the British. See R.S. Milne, *Government and Politics in Malaysia*, the University of British Columbia; Houghton Mifflin Company. p 29

⁶⁰ Supra 57. p 145

⁶¹ Stephen Hong-Chye Chee, *Sociocultural Pluralism And Political Change: The Dilemmas Of The Bimodal Society In Malaya*; (Dissertation presented in partial fulfillment of the degree of Doctor of Philosophy, University of Pittsburgh 1971) p 207.

⁶² R.S.Milne and Diane K. Mauzy op cit 57 at p132

The Malayan Chinese Association (MCA)⁶³ was established during the communist insurgency. Since the communist comprised largely of Chinese, naturally, official suspicion fell on the entire 'Malayan' Chinese community.⁶⁴

It was under such tense background that the MCA was formed. Like UMNO, the MCA was initially a communal welfare organisation.⁶⁵ It was founded with a dual purpose; firstly to unite the 'Malayan' Chinese community so as to enable the 'Malayan' Chinese community to co-operate with the British government in fighting the communist insurgency.⁶⁶ Secondly, the MCA sought to protect the interests of the Chinese community in Malaya by providing the handicapped with material aid.⁶⁷

Besides that, the existence of the MCA also provided the "Malayan" Chinese with an 'alternative standard to communism.'⁶⁸

Running along identical lines with UMNO and MCA, the Malayan Indian Congress (MIC) was also established to protect and represent the interest of the Indian community in Malaya. The MIC also provided a medium for the Malayan Indians then to express their opinion in Malaya.⁶⁹

⁶³ The MCA was initially a welfare organisation. "It did not consider itself a political organisation.... However, in late 1951, Tun Tan Cheng Lock decided to turn the MCA into a political organisation." R.S.Milne and Diane K. Mauzy, *Politics And Government In Malaysia*, Federal Publication (1978) p125

⁶⁴ Tan Siew Sin, *The Role Of MCA And The Loyalty Of Malaysian Chinese*, (Ed. J. Victor Morias, S.B.St.J.(3rd Ed)(1971) p78

⁶⁵ R.S.Milne and Diane K. Mauzy, op cit 57 at p 125.

⁶⁶ K.J. Ratnam op cit, 56 at p152. See also Tan Siew Sin op. cit.,19 at p79

⁶⁷ K.J. Ratnam op cit, 56 at p153

⁶⁸ *Malayan Mirror* (the official organ of the M.C.A), 14 June 1953, p3.

⁶⁹ K.J. Ratnam op cit 56 at p 154

The three political parties mentioned above later successfully formed a coalition known as the Alliance Party.⁷⁰ The party later expended its representation to other various races by accepting other political parties, mostly communal in nature into its fold. They included amongst others the Peoples' Progressive Party (PPP); a Chinese and Indian based party; Gerakan; a predominantly Chinese Party, Sarawak United People's Party (SUPP); a Sarawak political party, predominantly Chinese, Parti Pesaka Bumiputera Bersatu (PPBB) and Sarawak National Party (SNAP) both predominantly Iban Sarawak parties.⁷¹ The Alliance Party was finally transformed into what it is known today as the National Front (Barisan Nasional).⁷²

Because of the pivotal role which communalism played in Malaysia, the main opposition parties, in particular Partai Islam Se Malaysia (PAS) and Democratic Action Party (DAP), were also formed along the same lines.

PAS⁷³ as an Islamic-religious and Malaya communal party has been known to be the most extreme Malay communal organisation in the political arena. At its root, PAS beliefs that "Malaya belongs to the Malays" and sought to achieve this by amongst others aiming for Malay as the official language, the recognition and extension of Malay rights, the restrictions on citizenship of non-Malays and the curtailment of non-Malay immigration.⁷⁴

⁷⁰ The ad hoc alliance between MCA and UMNO was formed on 9th January 1952. This ad hoc alliance tasted its first success in the Kuala Lumpur municipal elections in 1952. This incident spurred UMNO and MCA to institutionalised the arrangement in 1954. To complete the representation of each major community, MIC was approached to join the Alliance, which it did in October of 1954. RS Milne and Diane K. Mauzy, op cit., 57 p127-129 and Diane K. Mauzy, *Barisan Nasional, Coalition Government in Malaysia*, University of British Columbia, Marican & Sons(Malaysia) Sdn. Bhd. (1983.) p16-18.

⁷¹ Diane K. Mauzy, op, cit 70, p170-175.

⁷² The term 'national front' (Barisan Nasional) was apparently used publicly for the first time by Tun Razak in August 1972 as a concept. Initially, the term 'national front' remained elusive and undefinable. The term was however gradually exposed to the public and finally on 1st of June 1974, the National Front was officially registered as a legal functioning party (ie a confederation of political parties) with a common symbol, ie, the scales of justice or 'dacing'. RS Milne and Diane K. Mauzy, op cit., 57 p188-189 and Diane K. Mauzy, op. cit 70 p.75-77

⁷³ PAS initially was a purely religious and Islamic welfare movement. It allowed its members to support any political party. However, because PAS was angry at UMNO's concessions to the non-Malay parties, it decided to become a political party to protect Malay rights from being whittled away. RS Milne and Diane K. Mauzy, op cit., 57 p143. Also see K.J. Ratnam op cit 56 at p 165

⁷⁴ RS Milne and Diane K. Mauzy, op cit., 57 p143-144

The Democratic Action Party (DAP), a spin off of the Peoples' Action Party (PAP)⁷⁵ was formed when the former was deregistered in Kuala Lumpur.⁷⁶ Although the DAP tries to project a multi racial image of its party, nevertheless, it still bears the mark of PAP, a party which was formed in Malaya as the alternative political party to MCA. This can be seen in the theme of racial equality which called for a 'Malaysian Malaysia' aimed at establishing by constitutional means a non-racial democratic socialist pattern.⁷⁷ In fact, the control and support of the party comes primarily from the urban working class Chinese.⁷⁸ The DAP has now grown to become the strongest non-Malay based opposition party.

Since communal considerations dominated major communities in Malaya in various fields including the political field as compared to other considerations, it seemed inevitable that most successful political parties were formed along those lines. Other political parties which tried to espouse inter-communal unity; like the Independence of Malaya Party (IMP) which was a non-communal party established by Dato' Onn Bin Jaafar failed to win the support of the Malay because of the striking difference between the IMP's policies and the attitude of the Malay community. The other political parties included the coalition between Pusat Tenaga Ra'ayat (Putera) and the All-Malaya Council of Joint Action (AMCJA) (Putera-AMCJA) which amongst others fought for equal protection of all communities in Malaya. It also failed to win the support of the Malays, which then were more attracted to Malay nationalism.⁷⁹ Political parties which espoused ideological aspirations; like the Malayan Nationalist Party (MNP) which amongst others sought to unite the leftist element with the

⁷⁵ The PAP was formed as an alternative to MCA. It sought the support of non-Malay electors who were anti-MCA which it alleged was a 'rich man's party' and was not dedicated to its fight for non-Malay rights. RS Milne and Diane K. Mauzy, op cit., 57 p153 and R.S.Milne, *Politics In Ethnically Bipolar States; Guyana, Malaysia, Fiji*; The University of British Columbia (1981).

⁷⁶ 9 September 1965; RS Milne and Diane K. Mauzy, op cit., 57 p 152

⁷⁷ 'The PAP espoused the theme of racial equality and called for a 'Malaysian Malaysia. This theme was carried by DAP today as reflected by the party's aim to establish by constitutional means a non-racial democratic socialist pattern'. RS Milne and Diane K. Mauzy, op cit., 57 p152

⁷⁸ RS Milne and Diane K. Mauzy, op cit., 57 p153

⁷⁹ K.J. Ratnam op cit, 56 at p155, p158 and at p148-149

community and making demands for solidarity with Indonesia and the Socialist Front (SF)⁸⁰ had also by and large failed to take root in Malaya then.

The combined effect of the centripetal structures and the historical development of the political parties of Malaysia which is grounded on communalism has effectively prevented all but the 'efficiency' version of the doctrine of Separation Of Powers that exist between the Legislature and the Executive from taking root in the Malaysian Parliament. This combination has instead allowed the political parties, whose members substantially make up the composition of Parliament to easily influence and control both the Executive and Legislature simultaneously, thereby effecting their independence.

However the circumstance of today coupled with a change in the thinking of the Malaysian society has created the right foundation for multiracial political parties like 'Parti Keadilan Nasional' (Keadilan) to develop and grow. The reasons which contributes to the growth of multi racial political parties will be discuss in the upcoming chapter, which is Chapter 5.

⁸⁰ The MNP had ideological aspirations but this party courted failure because the Malays then were more communal than ideological; K.J. Ratnam op cit, 56 at p147-148
The SF with ideological ideas also failed for the same reason; K.J. Ratnam op cit, 56 at p174.

Impact of Political Parties on Separation of Powers in a Parliamentary Government.

The existence of political parties has paradoxically transformed parliament's original function from a representative body and one that is able to scrutinise the Executive, into an institution, which is politically dependent upon the government.¹

Erik Moberg² rightly submits that although the Legislature and Executive are theoretically invested with legal powers which are prescribed by the Constitution,³ these bodies are in fact influenced or controlled by outsiders; in particular political parties⁴ since almost all of the members in the Legislature and the Executive belong to a political party. An example can be seen in the Malaysian Parliament. As at 11th of April 2001, out of 194 seats in the Dewan Rakyat, 192 candidates belong a political party with only one belonging to an independent member. The national coalition party of the Barisan Nasional holds the majority number of seats that is 150 seats with the remaining 42 seats shared between DAP, PAS and Keadilan respectively.⁵

The degree of control that a political party has over its members in the Legislature and the Executive is by and large determined by the structure of the political party. A weak political party in terms of its control over its members would, effectively create three

¹ Parliament and Government; *Parliament in a Modern State*; at <http://www.parliament.gov.at/pd/dia/e> (anon) at p 1 of 2

² Moberg, Erik, *A Theory of Democratic Politics* at <http://www.mobergpublications.se/index.html>:

³ Id at p 1

⁴ Id at p 2 and 4. Moberg stated that besides political parties, other bodies which may influence the powers of legal holders' i.e. the Legislature and/or Executive includes union, big firms or even influential individuals.

⁵ See <http://www.parlimen.gov.my/parti-umum.php>. Article 46(2)(b)(iii). The newest constituent of Putrajaya though created on 1/2/2001 has not be filled.

independent actors (i.e. the Legislature, Executive and the political parties).⁶ This strengthens Parliament and the doctrine of Separation of Powers,⁷ in particular ‘ the common interest version.’, ‘the accountability version’, ‘the Rule of Law version’ and ‘ the balancing version’ since the Legislature is able to effectively check on the Executive’s policy and action and vice versa.⁸ The balance of power is therefore maintained in Parliament. Conversely, a strong and cohesive political party in terms of discipline and structure would effectively reduce the number of its actors to only one that is the political party, who will dominate both the Legislature and the Executive in terms of its composition and action. Erik Moberg expresses this point in the following manner:-

“... a country in which the political parties are absolutely cohesive and disciplined,...the party’s control of its representative in the executive and legislature is perfect....although the representatives have all the legal power they are completely in the hand of the party with its overriding influential power...”⁹

A dominant and influential political party weakens the Legislature and dilutes Separation of Powers,¹⁰ in particular the ‘ the common interest version.’, ‘the accountability version’, ‘the Rule of Law version’ and ‘ the balancing version’.

Nevertheless, irrespective of the degree of control that political parties have over members of the Legislature and Executive, the fact remains that political parties do influence and dominate the Legislature and the Executive in terms of its composition and

⁶ Moberg op cit 2 at p 4 of 14 submits that in a theoretical extreme of a country without political parties, individuals compete for the legal power position by themselves without belonging to any organisation thus creating various individual actors. Countries with loosely organised political parties are therefore closer to this model.

⁷ Duverger op cit 10 at p407

⁸ See supra Chapter entitled *Separation of Powers*.

⁹ Moberg op cit 2 at pg 3

¹⁰ Duverger, Maurice *Political Parties, Their Organisation And Activity In The Modern State*; Methuen & Co. Ltd (3rd Ed)(1964) p 407

actions. The influence and dominance of political parties on today's parliamentary government has radically altered the traditional concept of Separation of Powers in various aspects. Their influence and dominance are expressed in the following:-

“ While in the classical model of separation of powers the controlling function was exclusively vested in parliament as a whole, i.e. in the parliamentary majority according to the majority principle, under the circumstances of the party state in a modern parliamentary system it cannot generally be expected that the parliamentary majority relentlessly controls the activities of the government it supports.¹¹”

These alterations, which will be discussed in the subsequent chapters has amongst others affected the role of the Member of Parliament in the Dewan Rakyat and Dewan Negara, the effectiveness of the question of confidence, voting within the Legislature and the scrutiny of the Executive.

¹¹ Supra 1.

Parliament's Composition – A critical analysis of the Dewan Rakyat

Developed mass based political parties having centralised branch structures which now play an active and dominant role within the parliamentary government of Malaysia has substantially reduced the independence and representative role of the individual Members of Parliament. The dominance, which these political parties possess over the individual Members of Parliament, has altered the independence of the Members of Parliament into one where the Members of Parliament are heavily dependent upon the political parties. The aforementioned dependence encompasses various aspects within the electoral process, which will be dealt with in greater detail hereinbelow. These alterations on the status of the Members of Parliament have produced a negative impact on the capability and powers of the Malaysian Legislature vis-à-vis the Executive as well as the doctrine of Separation of Powers, in particular the 'the common interest version', 'the accountability version', 'the Rule of Law version'.

The ability of the political parties to influence and dominate the Members of Parliament in particular the Dewan Rakyat is contributed by the various weaknesses which are inherent within the electoral process. These inherent weaknesses appear as early as the nomination stage and culminate at the election process itself. This chapter therefore endeavours to examine the specific weaknesses in the entire electoral process and attempts to suggest reforms to strengthen the electoral process. The following areas which will be examined are as follows:-

- (A) The process of nominating electoral candidates. In this regard, the effect of such weakness on the electoral propaganda will be examined;
- (B) The role and powers of the Electoral Commission and
- (C) The electoral system which is adopted in Malaysia.

(A) The Process Of Nominating Electoral Candidates

The traditional or 'pure' theory of representative democracy is defined as follows:-

"Traditional representative democratic theory rests on two tenets. First the duty of members of Parliament of whatever party is to *represent independently* [italics mine] their whole constituencies and to further the general public interest, rather than the interest of the member's party,...; hence the party organisations outside Parliament should be primarily concerned to support, and not to dominate, the party in Parliament by organising and financing election campaigns and carrying out policy research and development. Second the government ought to be answerable to the whole community, as represented in Parliament.'¹

The 'pure' theory regards the respective representatives as agents who are directly elected by their constituents to protect the 'common interest and freedom' of their respective constituencies and the citizens. Thus, the electoral process is created to facilitate and realise the 'pure' theory of representation in practical terms. The 'pure' theory also complements and justifies the doctrine of Separation Of Powers, in particular the 'common interest version', 'the accountability version', 'the Rule of Law version' and 'the balancing version.'²

The intervention of developed political parties has however distorted the direct communication between the candidate or representative and the electors. Their intervention has altered the doctrine of representation in the following ways mentioned hereinbelow.

¹ Dawn, Oliver, "The Parties and Parliament: Representative or Intra-party Democracy" in Jeffery Jowell and Dawn Oliver, *The Changing Constitution*, Clarendon Press Oxford (1985) at p103

² Supra Chapter on 'Separation of Powers'.

A candidate who intends to run under a political party's banner will first have to be nominated by the party before he is presented to the electors. The nomination process conducted by the respective political parties is itself a form of an election. The process is usually a private act conducted within the political party and the nominees are usually left to the party leader, which is rather like co-opting.³ By applying the theory of representation into the process of nomination, it seems that the representative actually receives a double mandate; one from the political party and the other from the electors.⁴

Between the two mandates that the representative receives, it is submitted that the mandate of the political party is a more important mandate since it acts as a pre requisite to the mandate of the electors. In actual fact, the electors are only ratifying the choice of the political party. As Duverger states:

“ In practice, in a system with more than one party the voters' function is to choose between the candidates co-opted by the parties: co-option forms the first act in the electoral process, the election is only the second.”⁵

Sometimes in extreme cases, the party's nomination is sufficient to ensure the candidate's victory. Thus, it is the party which invests the individual with the identity and ability; not the capable or influential man seeking to gain more votes with the assistance of a political party.⁶

In Malaysia, like the United Kingdom, anybody can stand for the Dewan Rakyat or the House of Commons, provided he is able to pay the deposit and is not disqualified by law.⁷

³ Duverger, Maurice *Political Parties, Their Organisation And Activity In The Modern State*; Methuen & Co. Ltd (3rd Ed)(1964) p 354

⁴ Id p 353

⁵ Id; p353 and p371

⁶ Duverger op cit 3 at p 355

⁷ Under Article 47 of the Federal Constitution of Malaysia, a person is disqualified from sitting in the Dewan Rakyat if he is under 21 years of age and/ or if he falls under any of the categories mentioned in

However more often than not, the chances of success of 'party' candidates are higher compared to 'non-party' candidates simply because the former is supported by an organisation in all aspects of his campaign, particularly the financial backing.

The centralised style in the nomination process which is adopted by all the major political parties⁸ in Malaysia, for example, within the National Front, allows the central policy making body of the respective political parties to dominate the selection of candidates or nominees in the election.⁹

An example where the centralised style of nomination process is practised can be seen in the National Front. Within the National Front itself, the branches of the respective coalition parties, ie, UMNO,¹⁰ MCA, MIC and the other coalition parties will each suggest a candidate. These suggestions will be submitted to the division and state level organisations of the respective coalition parties. A list of the potential candidates will finally be submitted to the Candidates Selection Committee at the national level for its consideration. At the national level, its leaders exercise wide discretion in the final selection of candidates, which is evident in various ways.

Article 48 of the Federal Constitution. Similar provisions can be found in UK under the House of Commons Disqualification Act 1975 (U.K.)

⁸ "....an often-cited element of party decision is the centralisation of power among national leadership organs....." "In passing, it may be noted that, if anything, opposition selection of candidates is more centralised than the procedures within the coalition." Musolf, D. Lloyd and Springer, Frederick J; *Malaysia's Parliamentary System: Representative Politics and Policymaking in a Divided Society*; Westview Press; at p81-p82

⁹ Musolf, D. Lloyd and Springer, Frederick J op cit 8 at p 81

¹⁰ Smith, T.E.; *The Administration of the Election in* K.J. Ratnam and R.S. Milne, *The Malayan Parliamentary Election of 1964*. Singapore: University of Malaya Press at p 87-p89

Firstly, the national leadership will decide how the seats are to be apportioned between the various coalition parties in order that they do not oppose one another. Secondly, the consolidation of names at the divisional and state level formally divorces the names of potential candidates from the support they receive at the local level.¹¹ This, it is submitted minimises the personal qualities which the individual attracts and it refocuses the capability to the party i.e. that it is the party which invest the individual with capability and not the other way round. Finally the national leadership not only decides who will stand for the election, it also decides where the individuals will stand.¹² This procedure, it is submitted again not only shifts the importance of the individual candidate to the party, it also causes the successful candidate to owe his success to the party and not himself in the event the candidate wins.

The political party will generally choose its candidates from the 'unknown or the unhonoured'. This will cause the nominees or representatives if they become successful to owe their fame to the party and not themselves.¹³ This strengthens the position of the political party in both the Legislature and Executive.

This practised was revealed implicitly during Dr. Mahathir's premiership where Members of Parliament from the National Front were given the impression that they should be "grateful" to the party for having been successfully selected as political candidates and later successful representatives of their respective constituencies. Successful candidates were also given the impression that they "owed" their success to the party and not the respective candidate himself.¹⁴

¹¹ Id at p 81

¹² Id at p 82

¹³ Duverger op cit 3 at p 200

¹⁴ Chin Thye, Choo; *Limiting The Restrictions On The Right Of Free Speech In Malaysia - A Misguided Legacy*, LLM Seminar Paper, Law Faculty, University of Malaya, 2001/2002.

During the premiership of Tun Abdul Razak, the apportioning of seats were highly centralised in the National Front. According to Milne, "the number of seats allocated to each party inside the Front was made by Tun Razak, as was the final decision on the choice of individual candidates."¹⁵

Centralisation in the selection of candidates for election, it is submitted enables the elite within the respective political parties to control and dominate the selection and composition of Parliament; not the electorates nor the individual candidate as was originally envisaged by the theory of representation.¹⁶

The communal aspect in Malaysia further tightens the grip which political parties have over the individual candidate. Contrary to the traditional theory of representation, Malaysian electors view political parties and not the individual candidate as champions of their respective interest. The Malaysian electors' perception was captured in the following excerpt taken from a national newspaper:

"The voter has learned the art of survival well,... The wakil rakyat (representative) can sort things out faster- a strong wakil rakyat, *that is, with a strong party machine to back him up* [italics emphasise]. Experience has taught the voter that *the wakil rakyat can be effective: the party machine and the party headquarters* [italics emphasise] can rival the D.O.(District Officer)...in efficiency and influence...[and] the voter knows too...that he can air his grievances should the wakil rakyat misbehave. *There is a party branch.... and the party headquarters in Kuala Lumpur...*[italics emphasise]."¹⁷

¹⁵ Milne, R.S.; *Malaysia and Singapore in 1974*; Asian Survey 15 (February) (1975) at p169.

¹⁶ A study by Musolf and Springer indicated that three-fourths (76 percent) of the MP's which they had interviewed had served in official party positions either as officers or staff. The study also showed that the average length of party responsibility of the MP was nearly twelve years. Musolf, D. Lloyd and Springer, Frederick J op cit 8 at p 88.

¹⁷ This is aptly illustrated in account given by a journalist who visited an east coast Malay-oriented constituency during the 1974 campaign (*Malaysia New Straits Times*, August 12, 1974).

This patron-client relationship¹⁸ which exists between the political parties and electors allow the political parties to dominate the selection of candidates without much resistance from the electors. It fortifies the theory that electors are merely ‘rubber stamps’ of the choices made by political parties.

UMNO has since the time of Malayan Union proven itself to be a capable defender and protector of the Malay community in Malaya, now Malaysia.¹⁹ The image portrayed by UMNO has created in the Malay community and Malay voters a mindset that it is the political party (irrespective of the candidate it presents for nomination) who will effectively protect their interests and rights.

Similarly for the MCA²⁰ and MIC²¹, the respective Chinese and Indian communities in Malaysia have always looked towards their respective political parties as defenders and protectors of their communities interest and rights.²²

¹⁸ There are four characteristics which exists in a patron client relationship:-

- (a) the relationship develops between two parties of unequal wealth, status and power. “ It involves a socially, political or economically superior person in a vertical relation with his social or economical inferior” See Wolf. E.R.; *Peasants*, Prentice Hall Inc. (Englewood Cliffs, New Jersey 1966) at p 86.
- (b) Formation and maintenance of the relationship depends upon the exchange of goods and services which could be in the form of service, favours and goods;
- (c) The development and maintenance of relationship also depends upon the proximity between two parties usually members of the same local community or *race*[*italics added, mine*]
- (d) The relationship is a manipulative one whereby both parties would try to reap the best benefits out of the relationship. The strength of the relationship varies according to the benefits that it provides.

Norazit Bin Selat; *The Patron-Client Relationship in Peasant Society*; thesis submitted to the Department of Anthropology, Sociology, Monash University, Clayton, Victoria, Australia in fulfilment of the requirements for the degree of MA; January 1978 at p 37-38.

¹⁹ Supra, Chapter entitled “ *Structures and Historical Development of Political Parties*” at p2

²⁰ Malaysian Chinese Association

²¹ Malayan Indian Congress

²² Supra, Chapter entitled “*Structures and Historical Development of Political Parties*”

The major opposition parties are no different from the main coalition party. Whilst the MCA's identification is with the Chinese business community, the DAP's ties to the urban Chinese poor²³ seem more important than communal membership. Thus, DAP has been viewed as protectors of the urban Chinese poor. For PAS,²⁴ their conservative Islamic appeals have attracted the support of the rural Malays.²⁵

The dominance of the political parties over the nomination of their respective candidates allows the political parties to have an indirect control over the successful candidates in Parliament. This allows the political party to dominate both the compositions of the Legislature and Executive simultaneously in the Malaysian parliament. As such, members of Parliament who owe their success to the political party will impose self restraint from effectively checking the other branch for fear that they may cause displeasure to their 'master', the political party, thereby weakening all but the efficiency doctrine of the Separation of Powers.

Electoral Propaganda

Political parties were originally established to assist in ensuring the success of their candidates: the election was the end and the party was the means. When political parties developed as an organisation, capable of directly influencing the political life, elections and electoral campaigns, the original function of elections were turned into opportunities to influence opinions²⁶ and to ensure the continued existence and growth of political parties instead.

²³ Musolf, D. Lloyd and Springer, Frederick J op cit 8 at p70. "Among the urban Chinese, highly disciplined parties such as the DAP have attracted and held support partly through their active representation of constituents interest before the bureaucracy." Id at p124

²⁴ Partai Islam Se Malaysia

²⁵ "The conservative Islamic appeals of the PI (Partai Islam) were symbolically important to rural Malays and that party came into power in some of the more traditional rural areas." Ibid

²⁶ Duverger op cit 3 at p 366.

Furthermore, since political parties nominated most parliamentary representatives, these parliamentary representatives became channels for the political parties instead of representing their respective constituencies.²⁷ This weakens all but the efficiency version of the doctrine of Separation of Powers.

A study conducted by Musolf and Springer²⁸ showed that representatives of the senior members in the ruling coalition party in Malaysia tend to pursue activities and represent the interests of ruling coalition; indicating a “downward” communication by the government to the people²⁹ as opposed to the theoretical “upward” communication by the people to the government.

To ensure that the interests and activities of the Executive are achieved, the Executive dangles the carrot of “resources” to the particular constituent. It was once noted that

“MPs from the parties of the old Alliance increasingly rely on representation through the allocation of government resources for their districts. Undoubtedly, membership in the governing parties enhances the ability of the MP to ‘deliver’ in this task. This would provide the district high visibility benefits, which affect greater numbers of constituents than particularistic services.”³⁰

²⁷ “Although in theory the MP claims to represent his whole constituency, in fact he represents his party’s interests.” Puthucheary, Mavis; ‘*Role of the Executive: The Relationship Between Party And Government. In Reflections On The Malaysian Constitution*’; (Ed.: Aliran Kesedaran Negara) p 138

²⁸ Musolf, D. Lloyd and Springer, Frederick J op cit 8

²⁹ Id at p 72 & 76

³⁰ Id at p 72 & p77

The control and allocation of resources to a constituent 'may provide a key to the restructuring of the relation between governing parties and their constituent.'³¹ Such restructuring weakens the independent power of the representative and the Legislature at large and makes the Legislature beholden to the Executive.

In this respect, all but the 'efficiency' version of the Separation of Powers suffers as members of the Legislature and Executive are now transformed into channels which are utilised for the benefit of the political party and not members of the constituencies as it was intended to be.

(B) The Role And Powers Of The Electoral Commission

When the Reid Commission and 1957 Constitution entrusted the Election Commission with the responsibility of conducting elections in Malaysia,³² their original intention was to establish an independent Election Commission. The Reid Commission's intention was expressed in the following manner:

"We recommend that an independent Commission should have the duty and responsibility of carrying out these matters [preparation of electoral rolls] and of organising and conducting elections ... We regard it as a matter of great importance that this Commission *should be completely independent and impartial* [emphasis mine]..."³³

³¹ Id at p76

³² *Federation of Malaya Constitutional Commission, 1956-1957*; Colonial No. 330, London: Her Majesty's Stationary Office, 1957, *Reid Commission Report 1957* at para 72 and the original Article 113(1) of the 1957 Federal Constitution which stated as follows:-

"There shall be an Election Commission, to be constituted in accordance with Article 114, which, subject to the provisions of federal law, shall conduct elections to the House of Representatives and the Legislative Assemblies of the States *and delimit constituencies* [emphasis added] and prepare and revised electoral rolls for such elections."

³³ Reid Commission Report op cit 32 at para 107

However, pursuant to the various constitutional and legislative amendments that were made thereafter, the powers of the Electoral Commission was reduced effectively whilst the powers of the Executive was simultaneously increased. The reduced powers of the Election Commission had indirectly affected the composition and ability of the Legislature vis- a-vis the Executive in the following ways:-

- (i) The Constitutional Amendment Act of 1962³⁴ granted the Prime Minister the right to modify and even to reject the Commission's proposal for delimitation before presenting them to Parliament.³⁵ This amendment, it is submitted, had effectively shifted the power of the Election Commission to the Prime Minister, which is part of the Executive.³⁶ Professor Hickling pointed out the dire consequences of such transference (that is to the Prime Minister) in the following manner:-

'To transfer (the powers of the Election Commission) to the myth of a legislature and the reality of an executive is to make way straight for authoritarian rule. This may not be a fear for today, but what of tomorrow, when these powers may be at the other hands.'^{36a}

³⁴ The words "and delimit constituencies" in Article 113(1) were added by the Constitutional Amendment Act 1962 (No.14) in force from 21-6-1962.

³⁵ In particular, S9 Pt 1 13 Sch of the Federal Constitution was amended by the 1962 Amendment Act No. 13. S31 added the present Sch.13 to the Constitution. See Gurusamy (1962) 4 Mal LR 324, at p327-329.

³⁶ Rachagan, Sothi S. ; *Law And The Electoral Process* (1973) 219

^{36a} Hickling, R.H., *The First Five Years of Malaysia*

... to be administered by the Election Commission (No. 2) Act 1973

The amendment, it is submitted allows ample opportunity for the Prime Minister of a mass based political party to exercise gerrymandering³⁷ in the delimitation process. This would place the integrity and independence of the electoral process into question.³⁸

An example is illustrated below which indicates that the government of the National Front may have used its enlarged powers to practice gerrymandering, thereby producing a results which are favourable for the National Front in the subsequent elections.

The example is in relation to the establishment of the Federal Territory of Kuala Lumpur. During the state elections which was held in 1969, the then Alliance Party had failed to capture the Selangor State Assembly, since the residents of Kuala Lumpur, who were then electing representatives to the Selangor State Assembly and the House of Representatives comprised predominantly of non-Malay constituencies which supported the DAP.^{38a} However, with effect from 1st February 1974, when Kuala Lumpur was declared a federal territory, without any alternative assembly,^{38b} a large number of electors were carved out and removed from the Selangor state. The creation of the federal territory altered the communal

³⁷ This is the practice of fixing the result of an election by altering electoral boundaries to favour one side. It was named after Elbridge Gerry. When he was governor of Massachusetts, he redrew the boundaries of the electoral districts to give an advantage to his own party. An editor looking at the new distribution commented "Better say a gerrymander" and thereafter, the name caught on." *Voting Systems FAQ* at <http://www.vision25.demon.co.uk/pol/votefaq.txt>

³⁸ Rachagan, Sothi S op cit 36 at p219

^{38a} Id at p67

^{38b} 'No alternative assembly was provided for the Federal Territory and it was now to be administered by officials appointed by the Federal Government.S2-10 *Constitutional (Amendment) (No. 2) Act 1973*

composition, from one where the Chinese were initially the majority to one where the Malays formed the majority of electors.^{38c}

The creation of the Federal Territory meant that barring any substantial changes in the population composition and or distribution, no essentially non-Malay based party would ever be likely to capture the State Assembly of Selangor. This effectively prevented the DAP from mounting any credible challenge to the National Front in the 1974, 1978, 1982, 1986 and 1990 general elections.^{38d}

- (ii) The Constitutional Amendment Act in 1962 and again in 1972 had enabled Parliament (and effectively the Prime Minister in the Malaysian context practising the Westminster model of parliamentary government) the power to draw constituencies of sizes according to its own whims and fancies.³⁹
- (iii) Section 9(A) of the latest *Election (Amendment) Act 2002*⁴⁰ virtually prevents any future questioning of electoral rolls. This amendment it is submitted provides greater opportunity for financially strong political parties to manipulate the electoral process and the composition of the Dewan Rakyat⁴¹ by resorting to 'phantom voters' in order to gain votes. The term 'phantom voters' was defined as follows:

^{38c} Id at p67

^{38d} Id at p37

³⁹ Id at p220-p221

⁴⁰ "After an electoral roll has been certified or re-certified, as the case may be, and notice of the certification or re-certification has been published in the Gazette as prescribed by regulations made under this Act, the electoral roll shall be deemed to be final and binding and shall not be questioned or appealed against in, or reviewed or set aside by any court." *S9(a) Election (Amendment) Act 2002 (Act1155)*

⁴¹ "The issue at hand is whether the Election Commission can guarantee that the electoral rolls are up-to-date, clean and devoid of phantom voters. Naturally, the Election Commission will claim that its rolls are in order, as it did prior to the March 1999 Sabah state election. In fact, as the Court has ruled [in the case of *Harris Mohd Salleh v Ismail bin Majin, Returning Officer & Ors* [2001] 3 MLJ 433; [2001] MLJ Lexis 199 at p 13 of 16] that the electoral rolls were polluted with phantoms." Aliran Monthly, *New Threats to the Electoral System* at <http://www.malaysia.net/aliran/monthly/2002> at p1 of 6

‘Phantom’, according to the Concise Dictionary (9th Ed), means a form without substance or reality; a ghost; a spectre, and in the context of a phantom voter, it means that the voter is a non-citizen who is in an electoral roll by virtue of a fake identity card or identity card obtained illegally.” If such a situation occurs, the meaning of ‘representation’ will be lost completely and ability of the Dewan Rakyat reduced further because additional voters are added onto the voting list to give additional votes to a particular candidate.’⁴²

- (iv) The sharp increase in the prescribed maximum deposit to be required of contesting candidates from RM5,000 to RM20,000 in the latest *Election (Amendment) Act 2002*⁴³ is submitted may burden and exclude or eliminate poorer political parties and individuals at the outset. Such a provision, it is submitted, will increase the importance and dependence on political parties and reduced the importance of the capability of individual candidates. The amendment further strengthens the domination of political parties over the individual candidates.

These constitutional amendments it is submitted had effectively reduced the powers of the Electoral Commission and transferred them to the Executive, who is comprised of almost always the leaders of a political party. Thus the political party not only determines the electoral boundaries, they also have ample opportunities to manipulate the electoral process during voting and dominate the process of registering candidates.

⁴² *Harris Mohd Salleh v Ismail bin Majin, Returning Officer & Ors* [2001] 3 MLJ433; [2001] MLJ Lexis 199 at p13 of p16.

⁴³ “Power to make regulations relating to the conduct of elections to include inter alia the power to prescribe the amount of any deposit, not exceeding twenty thousand ringgit in each case, to be made by or on behalf of candidates, and the circumstance in which the deposit may be forfeited.” *S16(2)(d) Election (Amendment) Act 2002 (Act1155)*

These amendments had effectively increased the dependence of the Members of Parliament on the political parties thereby reducing the impact of all but the 'efficiency' version of the doctrine of Separation of Powers.

(C) Electoral System in Malaysia- its rationale

Malaya's first federal elections conducted in 1955⁴⁴ adopted the electoral system of Singapore⁴⁵; which was the United Kingdom's model of the simple majoritarian system or what is commonly known as the 'First Past The Post' system.⁴⁶

When the Federal Legislative Council was formed, it established a committee⁴⁷ to consider the best electoral system for Malaysia. After much consideration, not surprisingly, the Committee chose to adopt in toto the electoral system of the United Kingdom⁴⁸. The proposal of the Committee was accepted and implemented in the federal elections of 1955.⁴⁹ In spite of the weaknesses in the 'First Past The Post System', which was expressly acknowledged by the Committee; which amongst others included an exaggeration in the representation of the political party with the largest share of votes,

⁴⁴ Federal elections to the Federal Legislative Council

⁴⁵ 'There appears to have little discussion as to the type of electoral method to be used in local level elections. What seems to have happened is that the model in use in the United Kingdom and applied in Singapore was imported into Malaysia.' Rachagan, Sothi S op cit 36 at p5

⁴⁶ "The candidate who gains the largest number of votes (no matter how small the winning percentage of the vote may be) in the election wins the seat- irrespective of the proportion of votes cast for himself or his opponents. " Barnett, Hilaire., *Constitutional and Administrative Law*, (2000)., Cavendish publishing (3rd Ed.) p553.

⁴⁷ Federation of Malaya (1954) Report of the Committee Appointed to Examine the question of Elections to the Federal Legislative Council, Kuala Lumpur: Government Press. "The Committee consisted of forty six members appointed by the wholly appointed Federal Legislative Council then". Rachagan, Sothi S, op cit.36 at p 6

⁴⁸ Rachagan, Sothi S, op cit 36 at p 6

⁴⁹ Id at p7

nevertheless the Committee felt that the electoral system would assist in forming a strong government.⁵⁰

Although other majoritarian electoral systems such as the alternative voting system and the proportionate representation systems were considered by the Committee during their deliberation, these systems were however rejected mainly because the Committee felt amongst others that complications which exists in these systems may prevent the average voter from understanding the full significance of the electoral process.⁵¹

The Committee's reasons for rejecting the other types of electoral systems besides the 'First Past The Post System' were weak. Conversely, it is submitted that may be two ulterior reasons behind the Committee's decision to adopt the United Kingdom's model:-

Firstly, prior to the first national general election held in Malaysia,⁵² the 'First Past The Post' system was the only system practiced in the various states in Malaya as well as the local authorities elections. Because Malaya then was not exposed to other types of electoral systems besides the 'First Past The Post', they were thus unable to make any comparison between the various electoral systems.

Secondly, this simple majoritarian system produced an overwhelming majority for the then newly formed partnership of the Alliance Party. The Elections to the Municipal Council, the first elections to be held in Malaya, took place in December 1951 & February 1952 in Penang and Kuala Lumpur respectively using the model of the United Kingdom which was the 'First Past The Post' model. It resulted in a landslide victory (12 seats to 2) for the newly formed 'Alliance' party then. In all local elections during the years of 1952-

⁵⁰ Federation of Malaya (1954) Report of the Committee Appointed to Examine the question of Elections to the Federal Legislative Council, Kuala Lumpur: Government Press at p 14

⁵¹ Ibid

⁵² "Although at the state level there was some discussion as to the appropriate method to be used, all the states ultimately opted to adopt wholesale the method used in the United Kingdom, a simple majority system in single member territorial constituencies." Rachagan, Sothi S, op cit 36 at p 6

1953, the ‘Alliance’ won 94 out of 119 seats.⁵³ Since this electoral model was advantageous to the Alliance Party, naturally, the governing Alliance Party would not try to adopt other electoral systems, least it may turn the results against them.

The combined defects of the ‘First Past The Post’ model⁵⁴ together with the existence of developed mass political parties in a parliamentary system produces a weak Legislature which is dominated by political parties. Major defects of this imported model, in particular the exaggeration of representation⁵⁵ which results in an overwhelming majority and complete dominance of one political party in both the Legislature and Executive drastically dilutes the doctrine of the Separation of Powers, ie, particularly in all its versions except the ‘efficiency version.’

Limiting the Political Party’s Dominance In The Dewan Rakyat

To revive the doctrine of Separation of Powers between the Legislature and the Executive, a reform of the Legislature particularly the Dewan Rakyat is required in the following areas. These are a) the nomination of candidates for elections, b) the power and status of the Election Commission and c) the electoral system.

⁵³., Harding, Andrew., Law, *Government and the Constitution in Malaysia.*,(1996) Malayan Law Journal Sdn. Bhd. p27-28 and Rachagan, Sothi S, op cit 36 at p 5.

⁵⁴ The weakness of ‘First Past The Post’ system includes amongst others that it is non-representative, that it produces perverse results and that it exaggerates the movement in the people’s opinion. To see full discussion of the other defect appearing in this system please refer to ‘The Report of the Independent Commission on the Voting System” at <http://www.archive.official-documents.co.uk/documents>

⁵⁵ Proportion of votes and parliamentary seats won by Barisan Nasional since 1959

	1959	1964	1969	1974	1978	1982	1986	1990	1995	1999
Votes	52%	58%	48%	61%	57%	61%	57%	53%	65%	57%
Seats	71%	86%	58%	88%	85%	86%	84%	71%	84%	76%

Source: Lim, G, *Parliamentary Reform, Lessons from the UK and Europe*,
<http://www.malaysia.net/aliran/monthly/2002/6g.html>

(a) Nomination of candidates

Political parties as shown in the paragraphs above, are able to dominate the selection of candidates into the Dewan Rakyat during the nomination and electoral process.⁵⁶

Therefore, in order to strengthen the independence of the Members of Parliament, the hegemony and influence of political parties over their respective candidates must first be reduced and broken at the initial stage of nomination. By preventing the formation of such influence or dominance at an early stage, the successful candidate in the Dewan Rakyat will not feel obligated towards their respective political party.⁵⁷ The concept of 'democracy' will then be restored and the doctrine of Separation of Powers, in particular all but the 'efficiency version' that exists between the Legislature and Executive will be strengthened.

The independence of the respective candidates could be restored and simultaneously the dominance of political parties over the respective candidates in Malaysia reduced if the process of nominating candidates via direct primaries currently practised in the United States, in particular non-partisan primaries is adopted onto the political parties of Malaysia.

The American system of direct primaries is generally divided into two types; they are the non-partisan and partisan primaries. The former only restricts the participation to political parties whilst the latter is open to all candidates (including independents).⁵⁸

⁵⁶ Supra subheadings entitled *Nomination of Candidates* and *Electoral Propaganda*.

⁵⁷ Ibid. In a recent interview with The Sun newspaper the Prime Minister, Dr. Mahathir was quoted saying the following
"How many independent (candidates) have won in Malaysia. It's the party that wins, meaning that we're banking on the party...." The Sun 27/11/2002.

⁵⁸ Keefe, J. Williams, *Parties, Politics and Public Policy in America*, (6th ed., 1991), CQ Press, A Division of Congressional Quarterly at p90-93 and Brief of Amici Curiae, Eagle Forum Education & Legal Defense

Within the partisan primaries itself, there exists several types; they are the closed, open and blanket primaries. Under the system of close primary only members of the political party may participate in the nomination of candidates of that political party whilst in an open primary, the voter need not be a party member to vote. Under a blanket primary, the voter may vote for *any candidate [italics emphasis]* from *any party [italics emphasis]* without being limited to a single party's ballot direct primaries.⁵⁹

The system of direct primaries in whatever form has transferred the selection of electoral nominees from the respective political party to the voters.⁶⁰ During the nomination process, which is usually held at the public expense and supervised by public officials, the voters will select the respective nominees or candidates for the general election directly.⁶¹ Once the candidate is nominated into a primary, the local or national party leader *must [italics emphasis indicating that the party leader has no discretion]* accept that individual as a bona fide nominee of that party, irrespective whether that person was a preferred candidate or not.⁶² Once the nomination process is completed, the successful nominees will then be slated for the general election.⁶³

The nomination process of the United States may be adopted wholly into Malaysia, with a minor alteration, i.e. that the Electoral Commission should be in charge of conducting and supervising the nomination process in Malaysia, which should be conducted on a constituency wide basis.

Fund And The Claremont Institute Center For Constitutional Jurisprudence In support of Petitioners in *California Democratic Party, et al v Bill Jones, Secretary of State of California et al*, (Supreme Court of the United States)(No. 99-401) at p3-5

⁵⁹ Ibid.

⁶⁰ Keefe, J. Williams, op cit 58 at p89

⁶¹ Ibid.

⁶² Bibby, John F, *Politics, Parties and Elections in America*, (3rd Ed 1996), Nelson-Hall Publishers at p62

⁶³ Id at p 151

The advantages of transferring the nomination of candidates from the political parties to the mass voters includes the following: -

- i) It permits a direct expression of voter preference, thereby striking down the possible manipulation and influence of political parties, in particular the respective party leaders in the electoral process, as expressed in the following manner:

“ Under our [*United States*][italics mine] form of government the entire structure rests upon the nomination of candidates for office. This is the foundation of representative government. If bad men control nominations we cannot have good government.... With nominations of all candidates absolutely in the control of the people...the public official who desires re-nomination will not dare to seek it, if he has served the machine [*party*][italics mine].... and betrayed the public trust.” ⁶⁴

- ii) The process is democratic because it enables popular participation of the citizen in the constitutional and political process of the country;⁶⁵
- iii) It encourages the candidates for nomination to focus on their personality and individuality instead of relying on party labels. As a result, political parties will not be in a position to impose discipline and control on the successful candidates because they do not control the nomination process.⁶⁶

⁶⁴ Ellen Torelle, ed., *The Political Philosophy of Robert M. La Follette*, Madison, Wis., Robert M. La Follette Co., (1920) at p29-31.

⁶⁵ Keefe, J. Williams, op cit 58 at p94

⁶⁶ Bibby, John F op cit 62 at p 62

- iv) The process of direct primaries is also an exercise of one's constitutional freedom of speech.⁶⁷ It was argued before the United States Supreme Court in the case of *California Democratic Party, et al v Bill Jones, Secretary of State of California et al* that "one of the most essential of these activities [*freedom of speech*][*italics mine*] is the selection of individuals to endorse and promote for election to government office."⁶⁸
- v) The process of direct primaries also bears a striking resemblance to the principle of consultation⁶⁹ in the Islamic jurisprudence. According to Asad,⁷⁰ the members of the Elective Assembly in the Islamic State must be elected by the community. Thus, the government [*and legislature*][*italics mine*] are created on the basis of the people's free choice and is fully representative of this choice,⁷¹ without the intervention of political parties.

(b) Electoral Commission

To regain the independence of the Electoral Commission as the machinery which is responsible for conducting elections in Malaysia, the original powers of the Electoral Commission in delimiting constituencies⁷² as envisaged by the Constitutional framers must be adopted back into the Federal Constitution. Furthermore, challenges to the

⁶⁷ See Article 10 Federal Constitution of Malaysia and 1st Amendment in the Constitution of the United States.

⁶⁸ Op cit case of *California Democratic Party, et al v Bill Jones, Secretary of State of California et al*, (Supreme Court of the United States)(No. 99-401) at p11.

⁶⁹ "Their [the Believers'] communal business [amr] is to be [transacted in] consultation among themselves." Quran 42: 38. This *nass* injunction must be regarded as the fundamental, operative clause of all Islamic thought relating to statecraft. It is so comprehensive that it reached out into almost every department of political life...." Asad, Muhammad, *The Principles of State and Government in Islam*, (1980), Islamic Book Trust, Kuala Lumpur., p44

⁷⁰ Asad, Mohammad op cit 69

⁷¹ "... And if we accept the Divine dictum that all our communal affairs are to be transacted on the basis of popular consultation, we cannot escape the conclusion that the process of constituting the majlis must be, in itself, an outcome of "consultation" in the widest and most direct sense of the word." Id at p36 & 45

⁷² Supra, at 33 and 34.

electoral rolls must be allowed and the deposit for candidates must be returned to its original amount of RM5,000.

Such reforms if adopted would place the powers of controlling the constituencies onto the hands of an independent third party, rather than Parliament which is dominated by political parties. The right to challenge electoral rolls and the reduction of the amount of deposit would respectively act as a check and balance on the Electoral Commission itself and reduce the financial dependence of individual members on the political parties.

It is submitted that Article 113 (5) of the Federal Constitution should be amended to increase the powers of the Electoral Commission to make laws in relation to the whole electoral process. Their increased powers should include but is not limited to powers to provide a fixed amount to fund candidates running for elections

These reforms if adopted would increase the dominance and importance of the Electoral Commission whilst reducing the dominance and influence of political parties on the composition of the Dewan Rakyat via the electoral process. As a result, the independence of the Members of Parliament would be regained thereby strengthening all the versions of the Separation of Powers between the Legislature and Executive in Parliament.

(c)Electoral system

The present 'First Past The Post' electoral system which Malaysia practices today must be reformed if all the versions of the Separation of Powers between the Legislature and Executive are to be strengthened. In addition to the inherent defects which are apparent in the 'First Past The Post' system itself,⁷³ the following external developments of the political and social arena in Malaysia mentioned hereinbelow further justifies a reform of the present electoral system.

⁷³ Supra footnote 55 and 56.

Firstly, the 'First Past The Post' electoral system was originally created for a parliamentary government composed of decentralised cadre type political parties in the United Kingdom parliament. They grouped like-minded 'notables' who had organised their own elections as Members of Parliament, using their own money and supporters. Such men could take a critical independent line if they wanted. They owed little to the party, having secured election by their own efforts, and could secure election again even if they crossed to another party.⁷⁴ These Members of Parliament were not dependent on their political parties and were therefore able to take an independent stand or opinion. The same method of election into the parliamentary government cannot be effectively applied for today's developed mass political parties where Members of Parliament are highly dependent on political parties.

Secondly, the development and changes in the Malaysian society and political scene today justifies a change in the electoral system. Unlike Malaysians of the pre and immediately post independent era who were 'race-based' in their mindset, the current generation of Malaysians 'do not have any memory of pre-independence consociational social contracts nor the palpable terror of ethnic violence'.⁷⁵ Malaysians today are more 'issue based' in their thinking and perception. They are more rights-conscious; in terms of social justice, human rights and civil liberties. In respect of the post National Economic Policy (NEP)⁷⁶-Malays, a new class has emerged. Their problems unlike their forefathers have little to do with the lack of state aid in terms of economy.⁷⁷

⁷⁴ Budge, Ian et al., *The New British Politics*, (1998), Longman, at p370

⁷⁵ Mohamad, Maznah., *PAS vs UMNO. Who will win the 'Malay consensus' and more?.*, Aliran Monthly at <http://www.malaysia.net/aliran/monthly/2001> at p1 of 6.

⁷⁶ National Economic Policy

⁷⁷ "The political atmosphere of the 1990's was very different from that of the 1960's or 1970's. Within a few years of the NEP's implementation, many opportunities, perhaps 'crutches' even, had been made available for Malay advancement. The result is not the world described by Dr. Mahathir Mohamad in *The Malay Dilemma*. The 'life of the Malay in the 1990's' was not as simple as Dr. Mahathir's book portrayed it to be." Mohamad, Maznah op cit 75 at p 2 of 6

Instead, it is one of anomie, social alienation and political marginalization. According to Chandra Muzaffar, the dawn of urbanisation and changes [*brought about by the NEP*][*italics mine*] had created a 'small income' urban Malay community; many whom are literate and agitated by amongst others the severe restrictions imposed upon the various civil and political rights, by the violations of the rule of law and the pervasiveness of elite corruption. This has resulted in a new imbalance within the Malay community itself; between the well-connected dominant elite who have benefited disproportionately and the Malays without connections.⁷⁸

The following are examples indicative of the development and evolution of the Malaysian society's mentality. They have, it is submitted, progressed from a 'race based' mentality to a society which is 'issue based': -

(i) Islamisation

Although the political parties of PAS and UMNO were originally communal based (parties which were established to protect the Malay tradition and community), today, the two traditional rivals are fighting their political battles on a different plateau; the plateau of Islamisation.⁷⁹ The current contention between PAS and UMNO today is not communal based but one which is issue based. It centers on their different interpretations of Islam, in particular the issue of whether Malaysia is today an Islamic State or not.⁸⁰

⁷⁸ See Muzzafar, Chandra., 'UMNO, PAS and', Aliran Monthly, <http://www.malaysia.net/aliran/high9912a.htm>

⁷⁹ " Besides retreating on many of its own economic and social policies of bumiputera protectionism, UMNO also tacitly endorsed a floodgate of questioning and debate over the issue of the centrality and 'sacralization' of Islam in governance. This had to be done in an exceptional way because UMNO cannot afford to upset its own fine balancing of what is to be considered 'correct' Islam and 'incorrect' Islam." Mohamad, Maznah, *The Challenge of Islam Within and Beyond Democracy*, Aliran Monthly at <http://www.malaysia.net/aliran/monthly/2001> at p4 of 7.

⁸⁰ " If before, the idea of the Islamic State was an ambivalent strategy by PAS to distance itself from UMNO, now, it will be presented as a real, potent and explicit challenge to the dominant secular state. UMNO would have to address this new challenge." Ibid.

In fact, PAS today is currently attempting to build its reputation as a non-communal party, a far cry from what it originally established to be. The party today unlike what it was immediately after Merdeka,^{80a} now frequently stresses on Islam's recognition of equality among all races. Its policies on non-Muslims have also grabbed the attention of Chinese newspapers.⁸¹

(ii) Parti Keadilan Nasional ('Keadilan')

Although multi-ethnic political parties were unsuccessful during the pre and immediately post Merdeka period,⁸² today, the opposite is happening. The emergence of multi-ethnic political parties in particular 'Parti Keadilan Nasional' (Keadilan)⁸³ marks a change and development in Malaysian society.

It is submitted that 'Keadilan' party's existence is different from other mainstream political parties⁸⁴ in Malaysia today. Unlike the mainstream political parties of Malaysia which emerged out of the desire to protect their own races (i.e. race based⁸⁵), Keadilan

^{80a} See supra Chapter entitled '*Structures and Historical Development of Political Parties*'

⁸¹ "News of PAS's policies on non-Muslims had grabbed the attention of Chinese newspapers. In fact PAS's website, harakahdaily.com, has a column devoted to the translation of favourable news items about PAS, which are culled from the Chinese dailies. For example, headlines such as *Soal Hak Keistimewaan: PAS Lebih Berani*, are intended to raise PAS's credibility among non-Muslims." Mohamad, Maznah op cit 75 at p 4 of 6

⁸² For a historical development and successes of the main multiracial political parties in Malaysia please refer to the chapter entitled '*Historical Development and Structures of Political Parties*.'

⁸³ At its inception, Keadilan had a Malay as its president (Wan Azizah), whilst its deputy president was an Indian, Dr. Chandra Muzaffar. Others include Tian Chua, the Vice President and N. Gobala Krishnan the Deputy Youth Secretary-General. Muzzafar, Chandra op cit 78 at p4 of 4 and <http://www.suaram.org/isa/statement20010426-wac.htm>.

⁸⁴ For example, UMNO, MCA, MIC, PAS and DAP.

⁸⁵ For a historical development of the main political parties in Malaysia please refer to the chapter entitled '*Historical Development and Structures of Political Parties*.'

was formed from an issue albeit a political one; it was therefore 'issue based'. It emerged mainly from the Anwar Ibrahim issue which gave birth to the 'Reformasi' movement.⁸⁶ The continued existence of Keadilan today indicates a possible future for multi-ethnic political parties in Malaysia whilst the present political parties may soon subscribed to multi-ethnic membership⁸⁷ and fight for causes instead of their own communal groups.

(iii) 'Mahathirisim'

The charismatic leadership and personality of Malaysia's longest serving prime minister and president of UMNO, Dato' Seri Dr. Mahathir Mohammad, also had directly and indirectly altered, steered and challenged perception and thinking of the National Front party and the Malaysian society at large.

Dr. Mahathir had since the publication of the *Malay Dilemma* radically reformulated the Malay dilemma (which is submitted a communal issue) into a Muslim dilemma⁸⁸ (which is submitted is a religious issue cutting across the various communities in Malaysia.) in his book entitled *The Challenge*.⁸⁹

Mahathir had also altered the Malay nationalism from its 'age old preoccupation with the Chinese or non-Malay' (a communal perspective) threat into 'Malaysian nationalism',

⁸⁶ Mohamad, Maznah op cit 79 at p 2

⁸⁷ "While there had been other Malay based multi-ethnic parties in the past, the circumstances today favour the success of such an enterprise. Keadilan is an idea whose time has come." Muzzafar, Chandra op cit 78 at p4 of 4

An NST editorial (22 May 2001) which hinted on the possibility of multi ethnic parties anticipated as follows:
"UMNO may in the future open its doors to all Chinese in Sabah. In fact, the time may come when UMNO will be opened to the Chinese in the peninsular as well..."

⁸⁸ Boo Teik, Khoo., *Paradoxes of Mahathirism. An intellectual biography of Mahathir Mohammad.*, (Oxford University Press (1995) at p 41.

⁸⁹ Mahathir Mohammad, *The Challenge*, Petaling Jaya (1986), Pelanduk Publications; translated from *Menghadapi Cabaran*, Kuala Lumpur: Pustaka Antara, 1976.

now facing the new threat known as 'the West'⁹⁰ (an international issue). He had in fact been accused of suggesting that the NEP should be applied globally instead of domestically.⁹¹

Domestically, the populist approach of Mahathir had earned him the respect of the various Malaysian communities, not only the Malay community. He has created concepts which benefits not only to the Malay community but the Malaysian community as a whole. Examples include the following concepts; like the 'Vision 2020'⁹² or is better known as 'Wawasan 2020' which is a culmination of Mahathir's deepest ambition to transform Malaysia into a 'developed country' by 2020. It was officially promoted as the ideological pattern of the National Development Policy to succeed the NEP. The concept of 'Melayu Baru' encompasses the Malays who are capable of meeting all challenges, are able to compete without assistance, learned and knowledgeable, sophisticated, honest, disciplined, trustworthy and competent. This new generation of Malays is a new breed of self-made men, individuals who through their own effort and skills will achieve progress.⁹³ Finally Dr. Mahathir's concept of 'Bangsa Malaysia'^{93a} envisages a united 'Malaysian Nation', where the people are able to identify themselves first and foremost with the country, and then later with their race. Dr. Mahathir, openly acknowledging the concept of 'Bangsa Malaysia' said:

'Previously, we tried to have a single entity but it caused a lot of tension and suspicions among the people because they thought the Government was trying to create a hybrid....This could not work, and we believe that the Bangsa Malaysia is the answer.'^{93b}

⁹⁰ Boo Teik, Khoo,; op cit 88 at p42-47

⁹¹ Id at p80

⁹² 'Vision 2020' or 'Wawasan 2020' Id at p 328

⁹³ Id at p 328

^{93a} Asiaweek.com., 'One Nation, One People. Mahathir lays the groundwork for stronger unity.' At <http://www.asiaweek.com/asiaweek/95/1006/nat4.html>

^{93b} An interview with TIME magazine (December 9, 1996) at <http://rspas.anu.edu.au/cscsd/lim.html>

(iv) Women's rights

Women's right has also become another issue of contention between the political parties in particular UMNO and PAS. For UMNO women forms one of its bases in which the party obtains its support whilst for PAS the 'gender issue' is important to them if it plans to gain a more multiethnic and multireligious consenses in Malaysia.⁹⁴

(d) A Time For Change?

In view of the various reasons presented above, it seems that the Commission's justification that other electoral systems besides the 'First Past The Post' system may not be appropriate for the Malaysian society does not hold water today.

An alternative electoral system that Malaysia may choose to replace the current 'First Past The Post' system, it is submitted should have both elements of majoritarian and proportionate representation electoral system in the following percentages i.e sixty-percent (60%) to forty percent (40%). Such proportion in the proposed mixed electoral system is recommended for the following reasons:-

- (a) The element of majoritarian system should form a larger percentage of the proposed electoral system because majoritarian systems are known produce a strong and stable government.⁹⁵ However, the majoritarian element should be capped at sixty percent so as to prevent one political party, in particular the National Front from being over represented in Parliament;
- (b) On the other hand, the proportionate representation element which forms forty percent of the Legislature would not only result in a more representative Legislature, but

⁹⁴ Mohamad, Maznah op cit 75 at p 4 -5 of 6

⁹⁵ Supra subheading entitled '*Electoral system in Malaysia-its rationale*'

would also increase presence of other political parties (the opposition) thereby strengthening the Legislature's functions.

The closest electoral system, it is submitted which has both the majoritarian and proportionate representation element would be the system currently proposed in the United Kingdom⁹⁶ and still under consideration by the New Labour government in the United Kingdom.

Under this system known as the 'alternative voting top -up system' the voter has two votes. One for his constituency, adopting the alternative voting system which forms around eighty percent of the seats in the House of Commons and one for the additional top-up area which will adopt the open party list, comprising of around twenty percent of the seats in the House of Commons.

Under the alternative voting system, which is a majoritarian system, the voter will choose the candidates according to his preference, depending on the number of candidates which are slatted for the elections, for example 1,2,3.... After voting has completed, the votes will be counted in accordance to the first preference. The candidate who achieves more than fifty percent of the first preference votes will be elected into Parliament. If no candidates achieve more than fifty percent of the first preference votes, the candidate with the least first preference votes will be eliminated and his votes will be redistributed in full according to the second preference amongst the remaining candidates. This process will continue until one candidate achieves more than fifty percent of the first and second preference votes.

⁹⁶ The Independent Commission on Voting Systems, which was established by the New Labour government of the United Kingdom in 1997 proposed a mixed electoral system in its report presented to the government on October 29 on or around 1999/2000. The proposed electoral system is known as the 'Alternative Top Up System', commonly known as the 'AV+.' It fulfills the four criteria's which was set by the New Labour government which is stable government, extension of voter choice, maintenance of constituency link and broad proportionality. At <http://www.electoral-reform.org.uk>

In the top- up seats which adopts the open party list system, the list of contesting political parties and their candidates will be given to the voter. The voter may choose to vote for either the candidate or the political party. Political parties or candidates who have failed to secure any constituency seats under the alternative voting system although people may have voted for them would automatically be entitled for the top-up seats. Conversely, political parties or candidates who has secured a seat in the constituency seats are barred from taking the top-up seats although that party may have the most votes in the open party list.⁹⁷

By adopting the alternative voting system, not only are the voters given a wider scope to exercise their choice, the elected candidate will go into parliament with the support of at least the majority of first preference voters or at least the first and second preference votes.

The proportionate representation element, which constitutes around twenty percent of the seats in the Legislature will ensure that small political parties are constantly represented.

The proposals presented above must be carried out in unison, not piecemeal if we want to produce a strong Legislature viz Dewan Rakyat which is able to provide an effective check on the Executive thereby upholding the doctrine of Separation of Powers in all its versions.

⁹⁷ A detailed description of this system can be found at <http://www.archive.official-documents.co.uk/document/cm40/4090/contents.htm>.

Chapter 6

Parliament's Composition - A critical analysis of the Dewan Negara (Senate)

Although the existence of the Upper Chamber in a bicameral parliament theoretically strengthens the doctrine of Separation of Powers between the Legislature and Executive in a parliamentary system, in practice, more often than not, the Upper Chamber's powers are limited; and in almost all cases, it retains no more than the power of delay.¹ In extreme cases like the United Kingdom and Malaysia, not only are their Upper Chambers weak in terms of their powers,² the respective Upper Chambers have also been utilised by the Executive to strengthen its position and influence in Parliament. Based on this fact this chapter therefore seeks to: -

- (a) discover the Reid Commission's motive in proposing a mix Dewan Negara comprising of both appointed and indirectly elected members;
- (b) analyse the impact of political parties on the composition of the Dewan Negara and the doctrine of Separation of Powers; and
- (c) suggest reforms on the method of selecting members into the Dewan Negara to strengthen the doctrine of Separation of Powers that exist between the Executive and the Legislature.

¹ Duverger, Maurice *Political Parties, Their Organisation And Activity In The Modern State*; Methuen & Co. Ltd., 3rd Ed (1964) at p 397-398

² In Malaysia Article 68 of the Federal Constitution only grants the Dewan Negara delaying powers ie 1 month for money bills and not earlier than 1 year for non-money bills. Similarly in the UK the House of Lords, can only delay money bills for 1 month and 1 year over 2 sessions. *Parliamentary Act 1911 and Parliamentary Act 1949 (UK)*

(A) The Reid Commission's Original Intention.

When the Reid Commission was directed to "...make recommendations for a federal form of government for the whole country [Malaysia] as a single, self governing unit within the Commonwealth based on *Parliamentary democracy with a bicameral legislature [emphasis mine]*..."³, by a majority, the Commission recommended a bicameral Parliament comprising of an elected lower house and a mix composition of appointed and indirectly elected upper house. A close examination of the Reid Commission's mandate, it is submitted, reveals that the mandate did not expressly direct that the proposed bicameral Malaysian Parliament should comprise of an elected lower house and an upper house having appointed and indirectly elected members. Nevertheless, the majority of the Reid Commission was of the opinion that a "Parliamentary democracy with a bicameral legislature" should incorporate a bicameral legislature with a second chamber having indirectly elected and appointed members. At the same breath however, the Reid Commission has also recommended that Parliament should be invested with powers to reduce the number of nominated members or abolish them in the future if and when Parliament thinks that is desirable to do so.⁴

The Commission's majority decision for rejecting a directly elected upper house, similar to the United States or a legislature with an upper house having a mix composition of directly elected and appointed members may be contributed to the following reasons: -

- (a) Firstly, the members of the Commission who agreed to an indirectly elected and appointed second chamber were respectively appointed by the British and Indian

³ Para 3 at p2 of the *Federation of Malaya Constitutional Commission, 1956-1957*; Colonial No. 330, London: Her Majesty's Stationary Office, 1957, *Reid Commission Report 1957*.

⁴ Id para 61 and 62

Governments.⁵ Having no experience⁶ whatsoever with governments of directly elected or partially directly elected second chambers, their perceptions and ideas of a second chamber were naturally limited to their own experiences of the second chambers in their own countries.

The British Parliament never had a bicameral legislature which is composed of two elected chambers in their entire history. In fact, the original English Parliament had no representative element at all. When the English Parliament expanded with time, the King had, on his own initiative created an elected branch to compliment the existing appointed one.

Like the British Parliament, the Indian Parliament also never had an upper house of directly elected representatives. Ever since its inception, the Indian Parliament was always a bicameral Parliament composing of an elected house; which is the Lok Sabha and a mixed composition of an indirectly elected and appointed upper house known as the Rajya Sabha.⁷

- (b) Secondly, it is submitted that the Reid Commission had failed to take into account or had sufficiently considered and discussed the existence of political parties in the Malaysian context and its effects on the doctrine of Separation of Powers on the Malaysian Parliament whilst drafting the Malaysian Constitution. The failure of the Commission may be attributed partly to the short period of time, where the

⁵ They were Lord Reid and Sir Ivor Jennings, both nominated by the British government and B. Malik nominated by the Indian government. *Reid Commission Report 1957* op cit 3 at para 2.

⁶ It was expressly admitted by members of the Reid Commission that in the process of drafting the Constitution of Malaya, they also relied on their experiences. *Reid Commission Report 1957* op cit 3 at para 18. " But very many of the questions which we have had to consider are technical and not controversial. On these matters we have made all enquiries in the Federation which seemed likely to assist us and we have relied on our experience."

⁷ For a historical development of the English Parliament, please see S.B. Chrimes, *English Constitutional History*, Oxford University Press., 4th Ed(1978) from p49-p86.

See <http://alfa.nic.in/intro/introparl.htm>. See also Jain MP., *Indian Constitutional Law*, Wadhwa & Company Nagpur., 4th Ed(1994) at p17-20.

Commission took only 8 months (that is from June 1956 to February of 1957) to come up a their recommendations⁸ and the tensed background of the communist insurgency in Malaya then⁹ which the Reid Commission had to work under. This is evident from the fact that large parts of the Malaysian Constitution were borrowed from the Indian Constitution.¹⁰

The idea of direct elections to the Dewan Negara though mooted during the Commission's deliberations,¹¹ it is submitted was insufficiently argued and analysed by the Commission.¹² As a result, the Commission recommended the combination of indirect elections and appointment into the Dewan Negara. This proposal was adopted by the White Paper with a minor amendment to the number of nominated members; which was from 11 nominated members to 16 nominated members, an addition of 5 appointed members from the number recommended by the Reid Commission.¹³ The adoption of this proposal it is submitted had created various opportunities for the Executive to dominate the Dewan Negara, thereby severely diluting the doctrine of Separation of

⁸ The Reid Commission was formed on February 1956 but only started their work on 30th June 1956. They completed and submitted their recommendation of the Constitution of Malaya on 11th February 1957. Altogether, the Commission took only 8 months to come up a their recommendations. *Reid Commission Report 1957* op cit 3 at para 1, para 6 and para 100.

⁹ *Reid Commission Report 1957* op cit 3 at para 13 of the Reid Commission Report 1956-1957 "At a comparatively early stage in our work we found that various practical difficulties might arise if we remained in Malaya to prepare our Report..." Para 173 "We must take note of the existing emergency. We hope that it may have come to an end before the new Constitution comes into force..."

¹⁰ "A careful student of constitutional law may be able to demonstrate that many of the articles of the Constitution are not original but have been borrowed by the draftsman of the Constitution from other sources and especially from the Constitution of India promulgated on November 26th, 1949." RH Hickling, *An Introduction to the Federal Constitution*, Federation of Malaya Information Services., at p 17

¹¹ The Note forwarded by both Sir William McKell and Mr. Justice Abdul Hamid, both nominated by the Australian Government and Government of Pakistan respectively. They have in their Note proposed a directly elected second chamber. Unfortunately, they happened to form the minority opinion of the Commission. *Reid Commission Report 1957* op cit 3 at para 61 & 62.

¹² "...We decided that for the initial stages of this work, we should divide into groups. These groups did much of the basic work of framing and drafting our recommendations before the full Commission reassembled in Rome early in December" *Reid Commission Report 1957* op cit 3 at para 13

¹³ Colonial Office, *Constitutional Proposals for the Federation of Malaya*, Cmnd 210, London: Her Majesty's Stationary Office, 1957 (hereinafter referred to as the 'Government White Paper.') at para 20

Powers within the Malaysian Parliament particularly versions which were created to enable both the Legislature check on the Executive effectively.

(B) Executive dominance over the Dewan Negara

When the Merdeka Constitution¹⁴ added 5 appointed members to the total number of appointed members in the Dewan Negara that was recommended by the Reid Commission,¹⁵ it started the systematic process of reducing indirectly elected members whilst simultaneously increasing appointed members in the Dewan Negara.¹⁶ The number of indirectly elected members in the Dewan Negara continued to reduce systematically over a period of time pursuant to several constitutional amendments that were made. The combined results of these constitutional amendments had effectively turned the number of elected members as opposed to the appointed members at the Dewan Negara into the minority. There are currently 44 appointed members and 26 elected members in the Dewan Negara.¹⁷

The gradual increase of appointed members as against elected members over a period of time at the Dewan Negara reflects a gradual strengthening of the Executive's dominance over the Dewan Negara which forms part of the Legislature. In view of the fact the Yang di-Pertuan Agong is constitutionally bound to make his appointment on his Cabinet's advice,¹⁸ which is the Executive, it is submitted that the composition of the Dewan Negara in terms of its appointed members is effectively determined by the Executive.

¹⁴ Ibid

¹⁵ The Dewan Negara had 16 appointed senators and 22 elected senators representing eleven states; an addition of 5 appointed senators from the number recommended by the Reid Commission at paragraph 62 of their report.

¹⁶ The number of appointed members were increased to 'twenty two' by the Malaysian Act, 1963 (No. 26) to 'thirty-two' by the Constitution (Amendment) Act 1964 (No.19) and finally to 'forty' by Constitution (Amendment) Act 1978 (No. A442).

¹⁷ See Art 45(1) of the Federal Constitution.

¹⁸ See Article 40 of the Federal Constitution and the case of *Teh Cheng Poh vPP* [1979] 1 MLJ 50 where his lordship Lord Diplock held as follows:-

The appointed members in the Dewan Negara, which was originally intended to be an influential forum of debate to enable valuable opinions to be contributed on various matters, thereby acting as a check on the Executive was transformed into chamber for the Executive to exercise its power of patronage.

In the United Kingdom, in spite of the fact that there exists a statute which prevents the abuse of granting peerages, it has been alleged that there were circumstantial evidences which indicated that peerages were used as policy rewards for donations or support which was rendered to the political party.¹⁹ The same allegation is also levelled against the Dewan Negara of the Malaysian Parliament where it has been alleged that the Upper Chamber or Dewan Negara is filled up with party supporters or sympathisers of the political party in power to ensure the smooth passage of government bills.²⁰ Furthermore, it has been alleged that seats in the Dewan Negara are used as a form of 'reward' [*italics mine*] for party contributors as well as a means of retaining defeated party loyalist within Parliament.

"So when one finds in the Constitution itself or in a Federal law powers conferred upon the Yang di-Pertuan Agong that are to be exercisable if he is of the opinion or is satisfied that a particular state of affair exists.... the reference to his opinion or satisfaction is in reality a reference to the collective opinion or satisfaction of the members of the Cabinet."

See also the similar opinion expressed in the Federal Court decision of *Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 19 in particular the judgement of his lordship Ong Hock Thye FJ.

¹⁹ *Honours (Prevention of Abuse) Act 1925(UK)*. Lord Shackleton, former member of the Privy Council's Political Honours Scrutiny Committee, told the House of Lords that he believed honours were effectively being bought. From 1979, around 6 per cent of companies were making donations and they received about half of all knighthoods and peerages. The Labour Party alleged that between 1979 and 1992, eighteen life peerages and eighty two knighthoods were shared between seventy-six companies donating over 17 million pounds to Conservative coffers. Kingdom, John; *Government and Politics in Britain; An Introduction* (2nd Ed)(1999) at p325.

²⁰ Harry E. Groves; *The Constitution of Malaysia*, Malaysia Publications Ltd, Singapore (1964)

Dato Onn Bin Jaafar once made an allegation that, in spite of what the Constitution said, many of the members had not “ distinguished themselves in any way-except possibly in regard to their pockets.”²¹ Dato’ Onn’ had also pointed to the fact that ‘several of the Senators in the Dewan Negara had recently been defeated in the federal and state elections’.²²

With the Executive dominance seen evidently practised on the Dewan Negara in relation to its appointed members, it is not surprising that all but the ‘efficiency version’ of the doctrine of Separation of Powers between the Executive and Legislature is able to work effectively.

In respect to the indirectly elected members²³ of the Dewan Negara, they were originally created to amongst others represent the respective States of Malaya in Parliament.²⁴ The presence of State representation in Parliament it is submitted also acts as an effective check and balance against the Executive dominated Dewan Rakyat thereby strengthening the doctrine of Separation of Powers in all its aspects.

However, with the development of mass based political parties the original purpose of the indirectly elected members in the Dewan Negara’s has been turned into an illusion. Although the respective states are free to elect their representative into the Dewan Negara

²¹ R.S.Milne; *Government and Politics in Malaysia* ; The University of British Columbia; p 127

²² Ibid p128

²³ Art 45(1)(a) read with Schedule 7 of the Federal Constitution.

²⁴ The purpose of the Dewan Negara are

- (i) to enable experienced and talented persons to serve in a legislative capacity without being elected;
- (ii) to act as a chamber of second thoughts to allow for more reflection than would otherwise be possible in the heat of party political debate in the Dewan Rakyat;
- (iii) to ensure representation of the States in the legislative process.

Harding, Andrew, *Law, Government and the Constitution in Malaysia*, Malayan Law Journal Sdn. Bhd. (1996) at p96.

constitutionally, in reality, it is submitted that if the State Legislature and the Federal Legislature are dominated by the same political party, this may result in the Executive dominated Federal Legislature exercising an indirect control over the State Legislature's choice of their elected members in the Dewan Negara.²⁵ As a result, the Executive dominated Federal Legislature effectively decides the representative which will be elected by the State Legislature. The possibilities of such abuses were mentioned in passing by the minority opinion of Sir William McKell and Mr. Justice Abdul Hamid of the Reid Commission in the following manner:

“Moreover, election by the State assembly lends itself to the most grave abuses, as the experience of the USA has very clearly shown. Their original Constitution provided for the indirect election of Senators, but on account of the grave nature of developments under the system it was abandoned in 1913 in favour of popular elections....”²⁶

Such an idea may not be too far fetched if we were to look at the structures and organisations of the political parties in Malaysia. As shown in the previous chapter, political parties in Malaysia are of the centralised branch type.²⁷ The elite and party leaders of the majority political party in Parliament (National Front) forms the Executive (Cabinet) and Federal Legislature (Dewan Rakyat), whilst the divisional and branch committees form the State Legislature.²⁸ In view of the political party's structure and strict party discipline which is practised by all political parties, it is submitted, though not proven, that the Executive dominated Federal Legislature wields substantial if not total influence over the State Legislature's choice of representative into Dewan Negara.

²⁵ If this theory is applied onto Malaysia today, it would seem that this would apply to all the states in Malaysia except Kelantan and Terengganu where the political party in power which is PAS is different from the political party dominating the Federal Legislature which is the National Front.

²⁶ Reid Commission Report 1957 op cit 3 at para 34.

²⁷ Supra see Chapter entitled 'Structures and Historical Development of Political Parties.'

²⁸ Infra see Chapter entitled 'Scrutinising the Executive.'

Since the Executive is able to dominate the Dewan Negara through its elected and appointed members easily, the reforms proposed below are aimed at strengthening the Dewan Negara and the doctrine of Separation of Powers in all its versions within the Malaysian Parliament.

(C) Regaining the Independence of the Dewan Negara

To reduce the presence and dominance of the Executive in the Dewan Negara, thereby strengthening the doctrine of Separation of Powers between the Legislature and the Executive in the Dewan Negara in all its aspects, the reforms on the methods of appointing and electing members are given hereinbelow.

Methods of Appointment

The Executive, it is submitted should not be involved in any way whatsoever in the process of appointing members into the Dewan Negara. Instead, it is submitted that the power of appointment should be vested solely in the Yang di-Pertuan Agong alone or in the Yang di-Pertuan Agong acting on the advice of an independent body, not the Cabinet.

It is submitted that the Yang Dipertuan Agong should not be bound by Article 40 of the Federal Constitution²⁹ to take the advice of his Cabinet in appointing members into the Dewan Negara. Instead, his Majesty has the constitutional right to exercise his personal discretion in relation to such appointment.

²⁹ Article 40(1) of the Federal Constitution which states that
“In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet.”

Support for this view can be found in an article by R.H. Hickling.³⁰ In the learned author's opinion, the royal prerogative, customarily bestowed upon the Sultans before Merdeka was codified and transferred onto the Yang di-Pertuan Agong³¹ by the Federal Constitution. The Federal Constitution had broadly divided the exercise of the royal prerogative into two categories, that is those that are subjected to the Cabinet's or a specific body's advice and those that are exercisable by his Majesty in accordance to his personal discretion.³² Since the latter type of prerogative was not exhaustively listed out in the Federal Constitution,³³ the learned author was of the opinion that whenever the words 'if he [the Agong] is satisfied' or 'in his opinion' or like words appear in the Federal Constitution,³⁴ the Yang di-Pertuan Agong should be constitutionally entitled to exercise his prerogative personally, without the need to consult anyone.

Applying the learned author's submission on the appointment of members in the Dewan Negara, it is submitted that the Yang di-Pertuan Agong is entitled to and should exercise the power of appointment personally without taking the advice of the Cabinet.³⁵

³⁰ R.H. Hickling., ' *The Prerogative In Malaysia*'. In *Essays in Malaysian Law.*, Pelanduk Publication (1985)

³¹ Id at pg 191 & p193

³² Id at p197 & p198

³³ Id at p 198 'Article 40 defined certain of these discretionary functions, relating to the appointment of a Prime Minister, withholding consent to a request for dissolution of Parliament, and convening a meeting of conference of Rulers....; it also provides that such a discretion may be conferred by the Constitution itself...'

³⁴ Id at p27 " It is possible to split a few sunflower-seeds in the matter of interpreting Article 150 and other provisions of the Constitution: so that when, say, an emergency is to be proclaimed when the Yang di-Pertuan Agong "is satisfied" of the existence of a particular state of affairs, or can appoint senators from those who " in his opinion" have given distinguished service or achieved distinction in certain areas, the zealot can argue that such a subjective state of mind cannot be induced by the persuasion of ministers, and must exist as a personal discretion. [emphasis mine]".

³⁵ Ibid

A conflict however seems to have arisen between the opinion of the learned author on one side of the fence and the opinions of different authors. For example S. Jayakumar is of the opinion that under Article 150 of the Federal Constitution, the Yang di-Pertuan Agong does not have any discretion to proclaim a state of emergency but is *compelled to* [italics emphasise] act on the advice of the Government before making such a proclamation.³⁶ Similar views were also expressed in the constitutional cases of *Teh Cheng Poh*,³⁷ *Stephen Kalong Ningkan*³⁸ and the recent Federal Court case of *Abdul Ghani Bin Ali [commat] Ahmad & Ors v Public Prosecutor*^{38a} in relation to Article 150 of the Federal Constitution. Whilst the former is of the opinion that the Yang di-Pertuan Agong is entitled to exercise his personal discretion to declare a situation of 'emergency', the cases and opinion of other authors had decided that his Majesty is bound to exercise his discretion on the advice of his Cabinet.

Upon detailed analysis, it is submitted that no conflict arises at all. By applying the learned author's test on the constitutional cases mentioned above, it is submitted that whilst his Majesty is in the process of exercising his Majesty's personal discretion before declaring an emergency, the Yang di-Pertuan Agong had *decided [emphasis mine]* (indicating an exercise of personal discretion) to adopt the Cabinet's advice.³⁹

³⁶ Jayakumar S., *Emergency Powers in Malaysia in The Constitution Of Malaysia Its Development: 1957-1977* (Ed. Tun Mohamed Suffian), Oxford University Press (1978) at p332 and p335

³⁷ *supra* n18

³⁸ *Ibid*

^{38a} [2001] 3 MLJ 561

³⁹ R.H. Hickling *op cit* 30 at p204- p205 "Of this power [Article 150]...[it] is reasonable...to assume that the Yang di-Pertuan Agong will generally act on the advice of the Cabinet.... Such great powers have no doubt been entrusted to the Yang di-Pertuan Agong with the certain feeling that.... they "will be reasonably exercised."

In view of the fact that the position of the Yang di-Pertuan Agong was created to be above politics,^{39a} it is proposed that the Federal Constitution should be amended to explicitly allow his Majesty to exercise his personal discretion in appointing members into the Dewan Negara. To effect this proposal, the following amendments should be made to the Federal Constitution.

Firstly, Article 45(b)^{39b} of the Federal Constitution should be amended by adding the words '*in his discretion.*' Thus, the proposed amended Article 45(b) should read as follows ie '... (b) forty members shall be appointed by the Yang di-Pertuan Agong *in his discretion.*[italics mine]."

To fortify the proposed amendment to Article 45(b) of the Federal Constitution, it is also proposed that an additional category be included into Article 40(2) of the Federal Constitution.^{39c} The additional category which the Yang di-Pertuan Agong may constitutionally act in his discretion should include the appointment of members into the Dewan Negara.

^{39a} See Reid Commission Report op cit 3 at para 58 and 59. "He will be the symbol of the unity of the country..." "... each successive Yang di-Pertuan Besar will devote himself to promoting the unity and welfare of the country in many ways..."

^{39b} The present Article 45(b) of the Federal Constitution reads as follows:-
' forty members shall be appointed by the Yang di-Pertuan Agong.'

^{39c} The present Article 40(2) of the Federal Constitution reads as follows:-
'The Yang di-Pertuan Agong may act in his discretion in the performance of the following functions, that is to say:
(a) the appointment of a Prime Minister;
(b) the withholding of consent to a request for the dissolution of Parliament;
(c) the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, positions, honours and dignities of Their Royal Highnesses, and any action at such a meeting,
and in any other case mentioned in this Constitution.'

Besides investing the Yang di-Pertuan Agong with a personal discretion to appoint members into the Dewan Negara, it is submitted that the Constitution may alternatively be amended to expressly compel his Majesty to act on the advice of an independent body instead of the Cabinet.

The idea of establishing an Independent Appointment Commission to appoint members into the upper chamber was suggested by the Wakeham Commission,⁴⁰ a body set up and commissioned by the current New Labour government of the United Kingdom to suggest reform to the House of Lords, which is the second chamber of the Parliament of the United Kingdom.

It is submitted that the Dewan Negara may adopt the Wakeham Commission's proposal by establishing an Independent Appointment Commission to oversee the appointment of appointed members into the Dewan Negara. It is further submitted that this idea is not new nor alien to the Federal Constitution and neither does this idea contravene the spirit and intent of the Federal Constitution for the following reasons: -

- (a) The Yang di-Pertuan Agong is expressly allowed by the Federal Constitution to act on the advice of certain external bodies besides the Cabinet;⁴¹
- (b) Secondly, on certain appointments, the Federal Constitution has in fact compelled the Yang di-Pertuan Agong to act on the advice of various bodies besides the Ministers' advice.⁴² These bodies include the advice of amongst others the Public Services⁴³ and Police Force Commissions.⁴⁴

⁴⁰ The New Labour Government of the United Kingdom set up an Independent Royal Commission, under the chairmanship of Lord Wakeham, to recommend a composition of a fully reformed Second Chamber for the Parliament of the United Kingdom. After extensive consultation, the Wakeham Commission presented its report entitled 'A House for the Future' Cm 4534 on January 2000 which can be found at <http://www.archive.official-documents.co.uk/document/cm45/4534/contents.htm>.

⁴¹ Article 40(3)(a) & (b) of the Federal Constitution

⁴² 'The Yang di-Pertuan Agong appoints or dismisses ministers and assistants ministers on the advice of the Prime Minister; the Attorney General; the High Courts; and members of the following commissions: Railway Service, Public Services, Election, Police Force; and some members of the Judicial and Legal

To prevent the possibility of any Executive's influence on the proposed Independent Appointment Commission, it is submitted that the various interests groups expressly mentioned in Article 45(2) of the Federal Constitution⁴⁵ should be represented in the Commission. Their appointment onto the Commission should be made on the recommendation of the respective non-governmental organisations. In terms of their salaries and tenure, it is proposed that the salaries of the members of the Commission should be charged to the Consolidated Fund⁴⁶ and that their dismissal should only be effected upon the addresses of both Houses of Parliament; a position similar to the superior court judges in the United Kingdom.⁴⁷ The effectiveness of the last proposal will only be seen if the method of election into the Dewan Rakyat and Dewan Negara has been reformed.

As regards the Dewan Negara's elected members, it is proposed that Article 45(4)(b)⁴⁸ of the Federal Constitution, which allows for direct elections into the Dewan Negara be invoked. It is submitted that the method of nomination for election should be identical to

Service Commission and of the Armed Forces Council..." Muhammad Kamil Awang., 'The Sultan and the Constitution', Dewan Bahasa dan Pustaka, Kuala Lumpur (1998) at p199

⁴³ Article 144 (3) of the Federal Constitution

⁴⁴ Article 140(4) of the Federal Constitution

⁴⁵ "The members to be appointed by the Yang di-Pertuan Agong shall be persons who in his opinion have rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities or social services or are representative of racial minorities or are capable of representing the interests of aborigines." Article 45(2) Federal Constitution.

⁴⁶ The Consolidated Fund provides payments and salaries for amongst others the judiciary and the bill is passed without parliamentary debate. Barnett, Hilaire., *Constitutional & Administrative Law*., Cavendish Publishing., 3rd Ed (2000) n77

⁴⁷ S11(3) Supreme Court Act 1981 (UK)

⁴⁸ Parliament may by law-

- (a) increase to three the number of members to be elected for each State;
- (b) provide that the members to be elected for each State shall be so elected by the direct vote of the electors of that State;
- (c) decrease the number of appointed members or abolish appointed members. Article 45(4) Federal Constitution.

the procedure proposed in the Dewan Rakyat, as explained in the earlier chapters.⁴⁹ In terms of direct election of members into the Dewan Negara, it is proposed that amended Party List system, as explained in the earlier chapter of this dissertation be use as the method of election.⁵⁰

It is submitted that once the independence of the Dewan Negara's members are secured through the various methods proposed hereinabove, the tenure of members in the Dewan Negara will become irrelevant.⁵¹

If the effect of the proposed amendments on the Dewan Negara is taken in totality, the influence and domination by the one party dominated Executive over the composition of the Dewan Negara will be effectively restricted and or prevented. The proposed amendments will regain the independence of the Dewan Negara thereby effectively scrutinising the Executive and strengthening the doctrine of Separation of Powers in all its versions in the following ways: -

- (a) Irrespective whether the Yang Dipertuan Agong chooses to act independently or in accordance to the advice of the proposed Independent Appointment Commission, the one party dominated Executive will be prevented from controlling the method of appointing members into the Dewan Negara. Having appointed members in the Dewan Negara that is independent of the Executive, this would result in the Legislature providing a more effective check on the Executive. The balance of powers between the Executive and the Legislature will be partially restored and the doctrine of Separation of Powers in terms of its 'the common interest version', 'the accountability version', 'Rule of Law version' and 'balancing version' would be strengthened.

⁴⁹ Supra Chapter entitled *Parliament's Composition- a critical analysis of the Dewan Rakyat*.

⁵⁰ Ibid

⁵¹ The tenure of appointed members at the Dewan Negara is currently three years and it is not affected by a dissolution of Parliament. See Art45 (3) of the Federal Constitution.

- (b) The proposed method of direct election will enable the people to be directly involved in the process of choosing their elected members into the Dewan Negara. This will prevent or at least reduce the possibility of domination or control exercised by the Executive dominated Federal Legislature over the choice of representatives sent by the respective State Legislatures, particularly if the same political party dominates both the Federal Legislature and State Legislatures.

By altering the method of election, the legitimacy and independence of the Dewan Negara in respect of its function in scrutinising the Executive will not only be increased, but this method will also increase the responsibility of the Dewan Negara towards the electorate, thus shedding its negative image as a 'rubber-stamp' of the Executive. Such view was aptly echoed in the minority opinion of Sir William McKell and Mr. Justice Abdul Hamid of the Reid Commission in the following manner: -

"We are also opposed to the principle of indirect election, the system under which the State Legislatures may elect twenty-two members into the Senate...Under this system, the responsibility of the Senators is to the persons who elected them, ie to the members of the State Legislatures, and not directly to the people, who have no opportunity of passing judgement on their conduct. The duties of the State Assemblies relate to domestic powers vested in them under the Constitution, but it should not be a part of their function to choose for the people their representatives in the national parliament...."⁵²

The reforms will augur well for all the versions of the Separation of Powers which is 'the common interest version', 'the accountability version', 'Rule of Law version', 'balancing version' as well as the 'efficiency version' because the legitimacy and effectiveness of

⁵² Reid Commission Report 1957 op cit 3 at para 32 & 33

the Legislative arm i.e. the Dewan Negara to check on the policies and actions of the Executive will be strengthen.

Chapter 7

Parliament's Composition – Criticisms on the methods of disqualification.

The classical Parliament was able to maintain an effective check on and dominate the Executive even though it was compelled to transfer wide duties and powers to the Executive. As Redlich wrote;

“...in the eighteenth century and the first half of the nineteenth, Parliament was the central organ from which proceeded the most powerful stimulus to action and all decisive acts of policy, legislation, and administration: the second half of the century saw the gradual transfer from the crown and Parliament into the hands of the cabinet of one after another of the elements of authority and political power.”¹

Parliament's ability to retain an effective check on the Executive was mainly due to the fact that Parliament then was comprised wholly of independent cadre party members.²

The effective checks which Parliament possess over the Executive augurs well for the doctrine of Separation of Powers since it creates a healthy balance of power between the Legislature and Executive within Parliament, in particular ‘the common interest version’, ‘the accountability version’, ‘Rule of Law version’ and ‘balancing version’.³

When political parties underwent a process of metamorphosis in their organisational structures, particularly from cadre type to mass based structures, this radically shifted the

¹ J. Redlich, *The Procedure of the House of Commons*, Constable 1907, I pp. 207-210., *Parliament and the Executive An Analysis with Readings*, Ed. H.V. Wiseman., 2nd Ed., London (1967)

² Supra Chapter entitled ‘Parliament's Composition-A critical analysis of the Dewan Rakyat.’

³ See Chapter entitled *Separation of Powers*.

balance of power and domination between the Legislature and Executive, tipping the balance to the latter.

“The argument runs something like this. The huge constituencies, which a wide franchise creates, need elaborate and extensive machinery to spread the party gospel and bring supporters...to the poll. The personality of the ordinary candidate counts for little at a general election, because the party managers find it profitable to focus attention on few well-known leaders, and the electors have readily learnt to simplify the issues of the contest into a competition between rival Prime Ministers...⁴”

In Malaysia, Parliament is granted the sole authority by the Federal Constitution⁵ to decide on certain issues which may affect the tenure of its members, in particular whether the member is of unsound mind or a holder of profit.⁶ However, since the Malaysian Parliament comprises of members who belong to and are highly dependent upon political parties with centralised mass based structures, an Executive (which is composed wholly or largely of leaders from the majority party) having a strong party support in Parliament may use the relevant statutory provision⁷ granted to Parliament to expel any opposing minority members in Parliament or purge its own dissident party members in Parliament who repeatedly take positions independent from their respective parties.

Furthermore, because any party outside Parliament is prevented from questioning Parliament's action, this may further encourage the Executive's abuse of Article 48, in particular (1)(a) and (c).

⁴ Sir Gilbert Campion (ed), *British Government since 1918* at pp. 15-21, *Parliament and the Executive: An Analysis with Readings* (ed. H.V. Wiseman), 2nd Ed., London, (1967),

⁵ Reading Article 48 and Article 53 of the Federal Constitution

⁶ Article 48(1)(a) & (c)

⁷ Article 48(1)(a), (b) & (c) of the Federal Constitution.

The possibility of the above mentioned abuse occurring in the Malaysian Parliament, which adopts the Westminster style of parliamentary government, is real. The Westminster style Parliament which will be shown in the coming chapters, had successfully transposed the entire structure of a political party into Parliament whereby the leaders of the majority party occupies the Executive whilst its subordinate members fill the Legislature.⁸ The combined effect of such transposition together with the imposition of strict party discipline via party whips on its party members in Parliament allows the Executive to effectively determine and control Parliament's decisions, including its decisions to disqualify members of Parliament. The effectiveness of party whips on Members of Parliament was expressed in the following way;

“...Whereas now the Whips are ‘put on’ whenever Government policy is concerned, so as to show their supporters that they are expected to follow obediently. And this form of coercion is very effective. The result of this, it is concluded, is to *reduce the House in matters of Government policy to a registration chamber* [italics emphasis]...”⁹

The negative results which was produced by the system of party whips was again clearly expressed during a debate at the House of Lords in the United Kingdom Parliament:

‘The truth is that, under our present constitution, when the Cabinet is once in power there is no way of effectively controlling it...so the position really is this, The Cabinet, appointed by the Prime Minister, have dictatorial powers over the whole administrative functions of the Government, and the Prime Minister is answerable only to the majority of the House of Commons. Further, the *membership of that majority owe their position to the political*

⁸ Supra Chapter entitled “Parliament's Role in Scrutinising the Executive.”

⁹ Sir Gilbert Campion (ed), *British Government since 1918* at pp. 15-21., Wiseman op cit 4

organisation of the Party of which the Prime Minister is the chief [italics emphasis]...',¹⁰

Unlike the two previous provisions mention above, it seems that Article 48(b) of the Federal Constitution which expressly disqualifies a Member of Parliament if he is an undischarged bankrupt, is not, theoretically capable of being abused by the Executive dominated Parliament. This view is further substantiated by the fact that Members of Parliament are protected by parliamentary privilege, which is entrenched and secured by the Federal Constitution.¹¹

In practiced however, the experience of Opposition Members in the Singaporean Parliament has on the contrary shown otherwise. The ruling political party and Government of Singapore which is the People's Action Party¹² had successfully removed Opposition Members in the Singaporean Parliament by utilising Article 45 of the Constitution of the Republic of Singapore, which is in pari materia with Article 48(b) of the Federal Constitution of Malaysia.

In Singapore, the dominant political party, it is submitted had successfully circumvented the immunity granted to Members of Parliament by bringing civil suits, in particular defamation suits of substantial amount specifically during the election period where parliamentary privileges were not in operation. Once the defamation suits succeed, the members of the dominant party will then proceed with bankruptcy actions against the members of the opposition party, who may now be Members of the Singaporean Parliament. The bankruptcy order, if it is successfully made against the Opposition Member of the Singaporean Parliament, will not only disqualify the said Member of Parliament automatically but in addition prevent him from running for further election thereby achieving the aim of the majority political party of Singapore.

¹⁰ The House of Lords Debates, 17th May 1950: Official Report cc. 237-sq.q., Wiseman op cit 4

¹¹ See Article 63 of the Federal Constitution in particular Article 63(2), (3) and (5)

¹² People's Action Party (PAP), R.S. Milne and Mauzy, Diane K., *Politics and Government in Malaysia*, Times Books International (1978) at p432.

In the Singapore case of *Goh Chok Tong v Jeyaretnam Joshua Benjamin and another action*, the Plaintiff filed a defamation suit pursuant to an election rally which was held on 1 January 1997, the eve of polling day. Finding in favour of the plaintiff in that case, the Court of Appeal in Singapore proceeded to award the plaintiff with damages amounting to One Hundred Thousand Dollars (S\$100,000).¹³ Remarking on the civil suits, the opposition leader of the Singapore Parliament had accused the Singaporean ruling party of 'pursuing an agenda to destroy him politically by using defamation suits against him'. The said opposition leader had also alleged that the plaintiffs 'did not appear to be interested in receiving the money due them when he tried to send a cheque one day after the deadline, and added that "there was another purpose behind the bankruptcy proceedings."¹⁴

If the dominant political party of Singapore is alleged to have utilised Article 45¹⁵ of the Constitution of the Republic of Singapore which is in pari materia with Article 48(b) of our Federal Constitution to their advantage, it is submitted then that the opposition members and dissident party members in the Malaysian Parliament may also be subjected to possible similar abuses to our Article 48(b).

Limiting the Executive's dominance

The provisions to disqualify Members of Parliament are inserted in the Constitution to ensure that Parliament continues to have Members who are able to retain the public's confidence.¹⁶ In light of this, it is submitted that the provisions of disqualification should

¹³ [1998-3 SLR 337; 0001 SLR LEXIS 9718]. See also the criticisms of the case in a press statement entitled 'Defamation Suits for Political Ends: Amnesty International' at <http://www.singapore-window.org/1015ai.htm>. There were 11 more defamation suits filed by the political party of the PAP against the said Defendant.

¹⁴ See article entitled 'Jeya says Singapore's ruling party was out to destroy him' at 'Singapore Window' <http://www.singapore-window.org/sw01/010813af.htm>.

¹⁵ Article 45 of the Constitution of the Republic of Singapore

¹⁶ Report by the Committee on the Independent Commission Against Corruption to the Parliament of New South Wales on their inquiry into Section 13A of the Constitution Act 1902, published in December 1998 in

not be use as a form of retribution or punishment against the Members of Parliament by the Executive¹⁷ but to ensure that Parliament continues to have quality representation.

To prevent the Executive (which is composed wholly or largely by leaders of the majority political party in Parliament) from utilizing the provisions to disqualify Members of Parliament, the following reforms, aimed at curtailing the dominance of the Executive over the methods of disqualification should be adopted; particularly on issues where Parliament is vested with the sole discretion to decide. It is submitted that the proposed reforms would regain the independence of the Members of Parliament, thereby strengthening Separation Of Powers between the Executive and Legislature in the Malaysian Parliament.

Declaration of unsound mind

Parliament's position as a political forum which makes it incapable of determining the issue of insanity of its members was clearly expressed by Justice Barton's in the following:-

'It was found, no doubt, that the feeling of partisanship which necessarily arose from such a method of determination [*which includes determination of insanity*][*italics mine*] tinged that method with disadvantages outweighing the advantage of keeping in the hand of Parliament the right of determining these questions....¹⁸,

In view of this fact, it is submitted that the determination of insanity should be transferred to a third party, most probably the judiciary. Such an idea would be in line with the

[http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/59ce2be3c89ddc8fca2569a50012e0fc/3a0e832bd57452b0ca25693e001593aa/\\$FILE/s13a.PDF](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/59ce2be3c89ddc8fca2569a50012e0fc/3a0e832bd57452b0ca25693e001593aa/$FILE/s13a.PDF) at p14

¹⁷ Ibid

¹⁸ Per Barton J in *Homes v Angwin* (1906) 4 CLR at p 297,307-8.

Indian¹⁹ Parliament, where the judiciary is given the task to decide on issues pertaining to disqualification of their Members of Parliament. It is submitted that Article 48(1)(a) of the Malaysian Constitution should be amended to adopt the Indian provision of Article 102 (1)(b) in the following manner: -

A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament-

(b) if he is of unsound mind and so declared by a competent Court;

By transferring the power into the hands of an independent third party, which is the judiciary to make decisions on the insanity of the Members of Parliament, it is submitted that: -

(a) the Executive dominated Parliament will be prevented from abusing Article 48(1)(a) of the Malaysian Constitution to remove minority Members of Parliament or its dissident parliamentary members, and

(b) the judiciary would be the best forum to determine and declare their findings solely based upon law, unaffected by political considerations. Judicial determinations would set a minimum standard required of a Member of Parliament in accordance to the rule of law rather than political judgements. Thus, '...Parliament has therefore in many instances...transferred the right to a separate tribunal, not on the ground that it wished to deal with these questions as matters of litigation, but,...on the ground that it wished to remit such matters to men of experience and known fairness of mind, who should merely declare their findings upon the questions involved,...'²⁰

¹⁹ Article 102 (b) of the Indian Constitution

²⁰ Per Barton J in *Homes v Angwin* (1906) 4 CLR at p 297,307-8.

Holding office of profit.

Article 160(d) of the Federal Constitution which expressly allows Parliament to declare any office ²¹ as an 'office of profit' merely by passing an Act of Parliament, has created various opportunities for a one party dominated Executive in a Westminster model type of Parliamentary government to remove any Member of Parliament it wishes.

'Holding an office of profit' was originally created as a ground of disqualification to prevent and eliminate the influence of the 'Crown or executive' over the Legislature in particular the House of Commons. Anson had recounted how "[the] King might also influence individual members [of the Parliament] by inducements of personal advantage. Hence Parliament had inserted a clause in the Act of Settlement [which makes the] office or place of profit, held of the Crown, [to be] incompatible with a seat in the House of Commons..." ²² This retains the independence of the Legislature over the Executive. The provision 'office of profit' was therefore designed 'to protect the democratic fabric of the country from being corrupted by executive patronage. It ensures that Parliament does not contain persons who may be obligated to the government and be amenable to its influence because they are receiving favours and benefits from it.' ²³

Bearing the principle mischief which this provision is trying to prevent or eliminate and the Westminster model, which the Malaysian Parliament currently adopts, it is submitted that an independent body, distinct from Parliament should be entrusted with the duty to determine what would amount to an 'office of profit'. On this issue, it is further submitted that the Article 48(c) of the Federal Constitution should be amended to adopt and incorporate the procedure used by the Indian Parliament.

²¹ "...the phrase 'public service' [is] ambiguous...[since] Parliament is free to declare any office one of profit, but as each House is empowered to decide the questions of disqualification, and such decision is final, it is a matter of some embarrassment for the elected members of each House." Nik Abdul Rashid, *The Malaysian Parliament*, (Ed. Tun Mohd Suffian) at p145

²² Lane's Commentary on 'The Australian Constitution', 2nd Ed., LBC Information Services at p107

²³ MP Jain., 'Indian Constitutional Law.' Nagpur., Wadhwa & Co., 4th Ed., (1994) (Reprint) at p22.

The Constitution of India expressly remits the duty to the President of India to decide issues pertaining to the disqualification of Members of the Indian Parliament.²⁴ In deciding such matters, the Indian President is however compelled by its Constitution to refer such questions to the Election Commission and act according to the Election Commission's advice.²⁵

By adopting the Indian procedure explained above into our Yang di-Pertuan Agong and Election Commission respectively, it is submitted that the one party Executive dominated Parliament will be prevented from determining the tenure of the members in the Legislature. Furthermore, the Election Commission would be best organ to make such decisions because these issues are incidental to the qualification of members of Parliament. Thus, whenever any questions pertaining to the disqualification of Members of Parliament arises, such questions will be referred to the Yang di-Pertuan Agong who will be then be compelled by the Federal Constitution to take the advice of the Election Commission.

Bankruptcy

The Singapore experience has shown that a political party that dominates Parliament is able to use bankruptcy proceedings to remove opposition or minority Members of Parliament.

²⁴ Article 103(1) of the Indian Constitution states as follows:-
'If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of article 102, the question shall be referred for the decision of the President and his decision shall be final.' H.K. Sahary., *The Constitution of India, An analytical approach.*., Eastern Law House., 2nd Ed., at p335

²⁵ Article 103(2) of the Indian Constitution states as follows:-
'Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion.' Ibid

To prevent the reoccurrence of such incidences or the possibility of such occurrence, it is submitted that 'bankruptcy' should be removed as a ground or condition for disqualifying a Member of Parliament for the following reasons: -

- (a) the original intention for the provision of bankruptcy is not applicable today. As early as 1812, possession of property was an indication that the individual had an independent mind to vote and run for election. Thus bankruptcy then was often considered a crime because it was presumed that bankruptcy involved a bad character. However today, bankruptcy cannot be equated to criminal offence morally. Bankruptcy itself is not evidence of any kind of disreputable behaviour. Alternatively, bankruptcy may result from various reasons (for example bad businesses or losing a defamation action) which does not relate to the bad character of the person;²⁶
- (b) the provision relating to bankruptcy may instead today affect the independence of the Member of Parliament because he may vulnerable to undue influence from his creditors. His creditors may have the power to vacate the Member's seat by enforcing the debt,²⁷ as has happened in the Singapore Parliament.²⁸

It is submitted that the influence of the politically Executive dominated Parliament over the tenure of the Members of Parliament will be severely limited if the power to decide on issues of insanity and 'holding office of profit' of the Members of Parliament are transferred to an independent third party whilst the issue of bankruptcy is removed as a condition for disqualification. By effecting such transfer and removing the necessary condition which is imposed on the members of the Legislature, it is submitted that this

²⁶ Report by the Committee on the Independent Commission Against Corruption., op cit 16 at p29

²⁷ Ibid at para 6.4

²⁸ Supra footnote 13 & 14

would produce a stronger Legislature vis a vis the Executive thereby strengthening the doctrine of Separation of Powers in all its aspects.

Parliament's Law Making Function – A Critical Analysis

The impact and influence of the political parties on the composition of the Malaysian Parliament as shown in the earlier chapters of four, five, six and seven has weakened the various functions of Parliament, in particular Parliament's legislative function and its function to check on the Executive. The effects of political parties on Parliament's legislative function are manifested in various ways.

Having examined the influence and dominance of political parties on the process of electing and appointing members of both chambers in the Malaysian Parliament, this chapter seeks to examine the impact which political parties have on Parliament's legislative function. The particular legislative functions of Parliament which will be examined includes the area of delegated legislation, Parliament's legislative powers during emergency and finally, Parliament's legislative powers during normal periods.

(A) Delegated Legislation

The term 'delegated legislation' is used to denote two things; that is firstly, the subsidiary legislation itself which is made by the Executive or administration in pursuance of the powers which are delegated to it by the Legislature and secondly, the exercise of such powers by the Executive.¹ In the context of this dissertation, the discussion of delegated legislation will be limited only to the first aspect. The discussion will emphasise particularly on the negative impact which delegated legislation has on the concept of Separation of Powers between the Legislature and Executive.

¹ Jain, MP., *Administrative Law of Malaysia and Singapore*., Malayan Law Journal., 2nd Ed (1989) at p38.

It has been suggested² that Article 44 of the Federal Constitution³ which vests the sole legislative authority in Parliament, prohibits Parliament from delegating its law making function to any other body unless it is expressly permitted by the Federal Constitution⁴, for example, during emergencies. Such a view, it is submitted is to interpret the Federal Constitution in a pedantic and limited manner.

If we were to adopt such a literal approach towards interpreting the Federal Constitution without any consideration of today's situation, it is submitted that such an approach would impede the growth of the Federal Constitution and in due time render the Constitution a useless piece of legal document. Rather than adopting a restrictive approach towards the Constitution, we should instead adopt a liberal approach in interpreting the Federal Constitution. The judgement of the Court of Appeal by his lordship, Gopal Sri Ram in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* should be heeded where his lordship had this to say:

“ Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law [we should remember] that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be... I

² “ Therefore, it is submitted that the silence on delegation in Article 44 cannot be taken as implied consent to delegate the legislative power of Parliament to any other authority, for the power to delegate must be specified in the Constitution itself.” Nik Abdul Rashid., *The Malaysian Parliament* (Ed Tun Mohd Suffian), Oxford University Press (1978) at p152.

³ ‘The legislative authority of the Federation shall be vested in a Parliament, which shall consist of the Yang di-Pertuan Agong and two Majlis (Houses of Parliament) to be known as the Dewan Negara (Senate) and the Dewan Rakyat (House of Representatives).’ Article 44 Federal Constitution

⁴ Where delegation of the legislative function to the Executive, in particular the Yang di-Pertuan Agong is expressly permitted by the Federal Constitution for example Art 150 (2C) in the following manner:-

An ordinance promulgated under Clause (2B) [by the Yang di-Pertuan Agong][italics mine] shall have the same force and effect as an Act of Parliament and shall continue in full force and effect as if it is an Act of Parliament until it is revoked or annulled under Clause (3) or until it lapses under Clause (7); and the power of the Yang di-Pertuan Agong to promulgate ordinance under Clause (2B) may be exercised in relation to any matter with respect to which Parliament has power to make law...’

In the emergency cases of *Eng Keock Cheng v PP* [1966] 1 MLJ 18, *Osman & Ors v PP* [1968] 2 MLJ 137 and *PP v Khong Teng Khen* [1976] 2 MLJ 166⁴ the courts had held that Parliament could delegate its legislative powers.

conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it.”⁵

By applying the broad and literal approach towards our Federal Constitution, it is submitted that the Federal Constitution had implicitly though restrictively granted Parliament powers to delegate its law making function to other bodies, which includes the Executive. Three grounds can be offered in support of such a view.

Firstly, it is submitted that the concept of delegated legislation was implanted into the Federal Constitution through history, which was practiced since the colonial era in Malaya. Under the Residential system, the British Resident who acting on behalf and under the authority of the British Government⁶ and was sent to ‘advise’ the rulers of Malaya then ended up ruling the states.⁷ The creation of the Resident General did not stop the practise of delegated legislation. Instead, the laws were enacted by the Resident- General then who was the Executive in the Federate Malay States acting on behalf and under the authority of the British Government.⁸ The existence and practise of delegated legislation was thus absorbed into the Federal Constitution through our legal and political history.

Secondly, the exponential growth and complexity of state and governmental functions today prevents Parliament from keeping up with every facet of life;⁹ unlike in the medieval times, where things were much simpler. Thus, Parliament today is compelled to delegate some or most of its law making function to various bodies, in particular the Executive, thereby allowing itself to concentrate and discuss the

⁵ Per Gopal Sri Ram in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & anor* [1996] 1 MLJ 261 at pg 18 of 35 Lexis Nexis

⁶ ‘A British officer, acting under the instructions of a district Government [emphasis mine indicating delegation of duties] is sent to ‘advise’ a Malay ruler and his chiefs..’ Puthuchear, Mavis., *The Politics of Administration., The Malaysian Experience*, Oxford University Press (1978) at p5

⁷ Ibid at p6

⁸ Harding, Andrew., *Law, Government & the Constitution in Malaysia*, Malayan Law Journal Sdn. Bhd. (1996) p 17.

⁹ YL Tan & Li-ann Thio, *Constitutional Law in Malaysia and Singapore*, Butterworths, 2nd Ed (1997)., p 294

principles and policies of bills.¹⁰ The demands of today's complex society has therefore made delegated legislation a necessary evil.¹¹

Thirdly, the Indian Supreme Court in *Jatindranath v Province of Bihar*¹² has held that the view which prohibits Parliament from delegating its law making function to other bodies unless it is expressly allowed by the constitution in certain situations, for example in emergency, is confined only to the 'essential functions of the Legislature'.

Their Lordships proceeded to hold the following to be Parliament's essential legislative functions. They are: -

- (a) To declare what the laws shall be in relation to any particular territory or locality;
- (b) The power to extend the duration or operation of an Act beyond the period mentioned in the Act itself; and
- (c) The power to modify an Act without any limitation to the extent of modification.¹³

It is submitted that the functions deemed essential by their Lordships are those which relate to the policies and broad legal principles or standards of the law. Matters of details were not included within their definition of 'essential legislative function.'

The creation of delegated legislation has within the context of mass based political parties in Parliament, enabled the one party Executive to dominate the Legislature in its legislative function in the following ways, thereby weakening the doctrine of Separation of Powers between the Legislature and Executive: -

- (a) A characteristic of delegated legislation is the tendency to confer wide powers to ministers to enact delegated legislation. Usually, the Acts of Parliament places no

¹⁰ KC Wheare, *Legislatures*. Oxford University Press, (1963) at p219

¹¹ '... delegation as to matter of detail was a necessity under modern conditions., Dr. N.B. Khare., *Delegated Legislation-A Legal Analysis*, A.B. Lal(Ed), Chaitanya Publishing House.,(1956) at p183

¹² *Jatindranath v Province of Bihar* (1949) F.C.R. 595

¹³ Dr. N.B. Khare. op cit 11 at p 183

real restriction on the Minister's power to delegate, but the power is conferred in such a way that the minister can enact any regulations with the object of furthering the purposes of the statute.¹⁴ Moreover, under existing conditions, it is the Cabinet which exercises real law-making power. It lays its proposals before Parliament which generally confirms these proposals. As a result of such Acts of Parliament, the real legislative powers are placed in the hands of the Executive,¹⁵ thereby reducing the role and participation of Parliament in legislating. The procedure, which was initially created to assist Parliament, has now reduced Parliament into a rubber stamp of the Executive. Thus, in one sphere, perhaps, it looks as if the Executive has taken away a part of the Legislature's function, and that is in the matter of making the laws. The exercise by the Executive of law making powers, particularly by the growth of delegated legislation has meant that the Legislature no longer makes all the laws or even all the important laws.¹⁶

(b) In extreme cases, the Executive is sometimes allowed to make rules and regulations without the knowledge and assent of the Legislature. Thus rules and regulations are manufactured at such great speed and at such volumes that Parliament itself finds it hard to keep pace with them.¹⁷

(c) Once the law making powers are delegated to the Executive, it is submitted that the mechanisms of parliamentary control which were placed by the Legislature though it seems theoretically effective, are in practice no more than just a paper threat to the Executive. As Kenneth Bradshaw and David Pring points out:

'As the government's majority ensures that Parliament assents to them, it may be argued that the affirmative control (*of delegated legislation*)(italics mine) is little more than a paper threat.'¹⁸

¹⁴ Harding, Andrew, op cit 8 at p 248

¹⁵ Ibid. D.C. Sharma, *Delegated Legislation*, A.B. Lal (ed), The Indian Parliament, Chaitanya Publishing House (1956) at p170.

¹⁶ KC Wheare, *Legislatures*, Oxford University Press (1963) at p219.

¹⁷ D.C. Sharma, op cit 15 at p172

¹⁸ Bradshaw, Kenneth and Pring, David., *Parliament And Congress*, Constable, London at p384.

When a minister who is almost always a leader in the majority party in Parliament, exceeds his limits, the centralised structure of the political party together with strict party discipline prevents Parliament from taking any effective action against a defaulting minister.¹⁹

In view of the fact that delegated legislation is acknowledged as a necessary evil, where the Executive could dominate the Legislature, thereby diluting the doctrine of Separation of Powers between the Executive and Legislature, the following reforms proposed hereinbelow are aimed at increasing the effectiveness of the Legislature in scrutinising and controlling the Executive in terms of delegated legislation.

Strengthening Separation of Powers

It must be borne in mind that the effectiveness of these proposals mentioned herein above are dependent upon the adoption of all the previous proposals that were suggested to the composition of the Parliament in the earlier chapters.²⁰

Although Joint Committees are formed by both Houses of the Malaysian Parliament to examine matters which affects both Houses on an ad hoc basis,²¹ it is proposed that during the legislative stage, Parliament should form a permanent joint committee to scrutinise legislation which plans to authorise delegated legislation to the Executive. The joint committee should comprise of members of both the Dewan Rakyat and Dewan Negara to examine the provisions of the bills which plan to authorise delegate

¹⁹ D.C. Sharma. op cit 15 at p169.

²⁰ See supra Chapters entitled *Impact of Political Parties on Separation of Powers in a Parliamentary Government, Parliament's Composition – A Critical Analysis of the Dewan Rakyat, Parliament's Composition – A Critical Analysis of the Dewan Negara (Senate) and Parliament's Composition – Criticisms on the Methods of Disqualification.*

²¹ 'The process of setting up a Committee is as follows. The House passes a resolution that a Committee of both Houses be set up to consider a particular matter and this resolution is transmitted to the Dewan Negara. Once the Dewan Negara has indicated its intention to the Dewan Rakyat, the Dewan Rakyat will proceed to appoint members to the proposed Committee and the Dewan Negara would be informed of such appointment.' Ahmad Bin Abdullah, *The Malaysian Parliament (Practice and Procedure)*, Dewan Bahasa dan Pustaka, Kementerian Pelajaran Malaysia, Kuala Lumpur (1969) at p144-145.

legislation to the Executive and ensure that bill does not grant the Executive sweeping powers to create delegated legislation.²²

The effectiveness of these proposed joint committees will be seen more evidently if the proposals to the composition of Parliament and the structures of political parties are first affected. When the dependence of Members of Parliament over their respective political parties are severely curtailed, Members of Parliament will then be able to take independent critical stands against the Executive which in turn will result in a more effective examination of the bills by these proposed joint committees of Parliament.

Once the Act of Parliament granting delegated legislation becomes operative, the Malaysian Parliament could choose to adopt the method currently practiced in the United States Congress, known as the Congressional or legislative veto,²³ with the relevant amendments being made onto the process.

Unlike the method practiced in the United States whereby either House may impose a veto on the Executive's action, it is submitted that the whilst the Dewan Rakyat, being a wholly elected branch, should be allowed to veto delegated legislation, the Dewan Negara on the other hand, being a partially appointed and elected house should only be empowered to veto the operation of the delegated legislation for a limited period, for example three months. During such time, the Dewan Rakyat may choose to overturn or affirm the Dewan Negara's decision. In the event if the Dewan Rakyat continues to remain silent over the Dewan Negara's veto after the prescribed period, the Dewan Rakyat should be deemed to have accepted the Dewan Negara's decision. Such a proposal was made by the Wakeham Commission, an independent body

²² D.C. Sharma. op cit 15 at p 173

²³ Legislative veto or congressional veto is a statutory enactment, which permits the Executive to take part in legislation, subject to the later approval or disapproval by one or both houses. Legislative vetoes are arrangement of convenience for both branches: executives gain decision making authority they might not have otherwise, and Congress retains a second chance to examine the decisions (*and or delegated legislation*)(*italics mine*). Davidson H. Roger and Oleszek J. Walter., *Congress and Its Members.*, (5th Ed.), (CQ Press) (1996) p331. See also Bradshaw, Kenneth and Pring, David op cit 18 p 388-389.

The development of legislative veto is clearly associated with the delegation of reorganization authority to the president. Fisher, Louis., *The Constitution Between Friends, Congress, the President, and the Law.*, New York, St Martin's Press (1978) at p100-108

established by the New Labour Government in the United Kingdom to look into possible reforms of the House of Lords in the United Kingdom.²⁴

(B) Emergency

The doctrine of state necessity which amongst others states that “necessity knows no law” and that “necessity make lawful that which is unlawful”²⁵ necessitates the existence of emergency powers in a country in order to preserve the safety and continued existence of a country. To achieve this, almost all of the emergency powers that exist including that codified in Malaysia grants the Executive an almost totalitarian power to act under such circumstances. Thus it was concluded that ‘crisis or emergency government can seldom be constitutional governments.’²⁶ During such crisis when the Executive overshadows the Legislature and takes over the helm of the country including the law making function, not only does this enhance the power of the Executive where the Executive will be armed with wide law making powers thus having a direct bearing on the concept of constitutionalism,²⁷ the doctrine of Separation of Powers between the Legislature and Executive is also obliterated.

The contention which is levelled here is not against the existence of emergency powers but against the fact that the Federal Constitution has as a result of the various amendments made to Article 150,²⁸ allowed and granted the Executive an opportunity

²⁴ See <http://www.archive.official-documents.co.uk/document/cm45/4534/chap7.pdf> at Chapter 7 of the Report entitled ‘Scrutinising Statutory Instruments at p 10 & 11 of 12.

²⁵ It was stated by Chitty that “necessity knows no law” and Bracton that “necessity make lawful that which is unlawful.” Chitty, *Prerogatives of the Crown*, (1820) which was quoted in the Pakistan case of *In Re Special Reference PLD* [1955] SC 435 at 485 and S.A. De Smith, *Constitutional Lawyers in Revolutionary Situations*, 7 W. Ontario L.R.93, (1968) at p 97.

²⁶ John E. Finn, *Constitutions In Crisis: Political Violence and the Rule of Law*, Oxford University Press (1991) at p30

²⁷ Das, Cyrus V, *Government and Crisis Powers. A Study Of The Use Of Emergency Powers Under The Malaysian Constitution and Parts Of The Commonwealth*, Current Law Journal Sdn. Bhd, (1996) at p i.

²⁸ The provision dealing with Emergency powers (ie Article 150) ranks one of the most highly amended provisions in the Malaysian Constitution; being amended 6 times via. Act No.10 of 1960; Act No. 26 of 1963; Act No. 68 of 1966; Act No A514 of 1981 Act No. A 566 of 1983 and Act No. A 584 of 1984.

to create a perpetual state of emergency in Malaysia,²⁹ thereby suppressing the role and existence of the Legislature for an indefinite period. Such a situation enables the Executive to suppress the dominance of the Legislature whilst simultaneously limiting the Legislatures' dominance over Executive, thereby preventing all but the efficiency version of the doctrine of Separation of Powers from operating in Parliament.

Strengthening Separation of Powers

A balance between the need to allow the Executive to act unilaterally and speedily in order to protect the state on one end and the need to strengthen the doctrine of Separation of Powers between the Executive and Legislature on the other can be achieved if the Federal Constitution is amended to compel the Executive to reconvene Parliament within a stipulated time period to approve the ordinances that were made by the Executive through the Yang di Pertuan Agong during the emergency period.

This proposed amendment to the Federal Constitution would fall within the original intention of the framers of the Federal Constitution.³⁰ Furthermore, the proposed amendment would not only ensure that the Executive is made answerable to Parliament who is the sole legislative body within the shortest possible time for ordinances that were made during the emergency period, such a practice would also be consonant with other countries for example the United Kingdom and New Zealand. In the United Kingdom, Parliament must be summoned within five days whilst in New Zealand, the New Zealand Parliament must be summoned within seven days.³¹

²⁹ Goh Wah Seng, Mark, *Emergency And Preventive Detention Powers: Striking A Legitimate Balance. A Comparative Analysis*, LLM Seminar Paper, Law Faculty, University of Malaya, 2001 at p25

³⁰ *The Federation of Malaya Constitutional Commission, 1956-1957*; Colonial No. 330, London: Her Majesty's Stationary Office, 1957, *Reid Commission Report 1957* at para 176 recommended that 'if Parliament is not sitting when the Proclamation is made, then the government [*Executive*][*italics mine*] is allowed to make laws ("ordinance") during that time but Parliament must be recalled within 15 days. The report acknowledges that the government must be given the liberty and power to make laws immediately to deal with the emergency. Simultaneously, to prevent the government from abusing its powers, the report imposed a duty on the government to recall Parliament to approve any legislation passed by the government during the interim period."

³¹ *S1(2) United Kingdom Emergency Powers Act 1920 (UK)* and *S2(2) Public Safety Conservation Act 1952(NZ)*

(C) Legislative process

The existence of a combination of factors, all of which are explained herein below, had prevented the Legislature in a parliamentary government from effectively scrutinising the Executive during the legislative process. Such ineffectiveness has therefore enabled the Executive to impose its will on the Legislature during the law making process. The combinations of factors are: -

(a) Close and stable alliances

A close and stable alliance amongst the political parties where one of the allied groups assumes a dominant position in respect of the other groups within the alliance produces an effect similar to a dominant party system or two-party system. Thus, if one of the allied groups assumes a dominant position with respect to the others because of disproportion in strength or in structure, the cohesion of the alliance may be more developed and the similarity to bipartisan more marked. Such party systems tend to concentrate powers, which operates to the advantage of the Executive and at the expense of the Legislature.³²

In the Malaysian context, the National Front had proven itself to be a close and stable alliance. The National Front, formerly known as the Alliance party, adopted the 'mutual deterrence model of conflict management' where secrecy was the key rule of that political party. Once the decision between the elites of the ruling coalition has been reached, the rest of the members within the political party are expected to accept the decision.³³ This method which was employed by the National Front has produce

³² Duverger, Maurice *Political Parties, Their Organisation And Activity In The Modern State*; Methuen & Co. Ltd (3rd Ed)(1964) at p 410.

³³ See Chapters entitled *Structures and Historical Development of Political Parties and Parliament's Role in Scrutinising the Executive*. See also Johan Shamsuddin Bin Sabaruddin, *Pengaruh UMNO diatas Perkembangan Undang-Undang Negara*, LLB Project Paper 1986, Law Faculty, University of Malaya.

positive results for the National Front as they had successfully won all the general elections³⁴ at the federal level that were held in Malaysia since its independence.

(b) The parliamentary style of government

A parliamentary style of government also easily enables one party to simultaneously control the Executive and dominate the Legislature by holding an absolute majority in the latter. Through this model, government proposals or policies are prepared by the party's research groups, tabled by a party representative in the Legislature, voted by the party's parliamentary group and applied by the party in government. At the outset, the Legislature and Executive are like "two machines driven by the same motor; the political party."³⁵

Similarly, Lord Hailsham has expressed his fear on the possibility of the political party dominating both the legislative and executive arm of the state in a Westminster form of parliamentary government in the following manner:

'More and more, the House of Commons has become the instrument of the executive, *whose members all belong to the majority party, and together form the largest single group in the House*, [italics emphasis]... In place of the three branches of Government according to the classical theory..... we have one very powerful branch of Government virtually fusing the functions of the legislature and executive...'³⁶

Developed political parties have therefore emptied the institutions of the Executive and Legislature of all its reality and substance in a parliamentary system of government. Instead, they have transformed these institutions into mere constitutional

³⁴ Please refer to the table by Lim, G, *Parliamentary Reform, Lessons from the UK and Europe*, <http://www.malaysia.net/aliran/monthly/2002/6g.html> at footnote 55 in Chapter entitled *Parliament's Composition – A critical analysis of the Dewan Rakyat*

³⁵ Duverger op cit 32 at p 394.

³⁶ Lord Hailsham, *The Independence Of The Judiciary In A Democratic Society* [1978] 2 MLJ cxv at p cxvi. See also Rais Yatim, *Freedom Under Executive Power in Malaysia. A Study of Executive Supremacy*, Endowment Publications, Kuala Lumpur, (1995).

facades and have used them to perpetuate their existence and fulfill their own interests.

(c) Party Whips

The application of party whips in a parliamentary system of government composed of centralised branch type political parties distorts the concept of democracy which requires the electorate to dominate the parliamentary representatives in its decision and not party leaders. In such systems, parliamentary representatives are lead by their whips and party leaders, not the electorate. The clearest sign of subordination by the representative to the party is in the area of voting discipline.³⁷

A representative who does not conform to the required behaviour risks disciplinary action or expulsion by the party. Voting discipline is therefore more of a consequence than a means of ensuring discipline, i.e. parliamentary representative follow the respective instructions of their party because they are dependent on the party for other matters, for example financial, electoral, positions or post. Moreover, because the parliamentary group as a body comprises mostly of party members, it becomes subordinate to the party in the sense that its decisions must conform to the decision of the central body of the political party.³⁸

When party leaders occupy seats in the Legislature and sometimes Executive, voting discipline is further strengthen. The prestige conferred on such positions or status in the Legislature and or Executive further increases and solidify his authority in his party: thus shattering parliamentary power.³⁹

The discipline which exists within the party in a two party or dominant party system therefore enables the Executive (Cabinet) to dominate the majority party in the Legislature. This allows the Executive to obtain without difficulty the passage of bills

³⁷ Duverger op cit 32 at p 194

³⁸ Id at p194

³⁹ Id at p 201

and of the budget thereby reducing the Legislature into a mere 'rubber-stamp' of the Executive.⁴⁰

The fact that the Malaysian Parliament does not take cognisance of party whips,⁴¹ which is a political creature⁴² further, strengthens the dominance of the Executive's will over the Legislature.⁴³ The application of party whips compels Members of Parliament in the Dewan Rakyat to attend and vote in accordance to the wishes of the party, not their constituent. Furthermore, in the parliamentary government of Malaysia where leaders of the majority party forms the Executive whilst the remaining party subordinates occupies the majority seats in the Dewan Rakyat,⁴⁴ the application of party whips on individual Members of Parliament, coupled with the fact that notice of the bill is given at a very short time and a lack of time for debates⁴⁵ ensures that bills which are proposed by the Executive are approved by the Legislature in particular, Dewan Rakyat here without much or any resistance.⁴⁶

The habit of tabling bills at short periods and rushing them through the three stages [by applying party whips][*italics mine*] in Malaysia which was initiated during the Alliance era was conveniently followed by the National Front.⁴⁷ Indeed, it has been a common and constant source of complaint that Members of Parliament are not given

⁴⁰ Id at p 398

⁴¹ 'The term 'whip' is derived from the whippers-in of the hunting field who keep the hounds working as a pack and prevent them wandering. All parties in Parliament have some kind of whip to give their activities coherence and organization.' Bradshaw, Kenneth and Pring, David op cit 18 at p 30

⁴² Ahmad bin Abdullah ; *The Malaysian Parliament (Practice & Procedure)* ; Dewan Bahasa Dan Pustaka, Kementerian Pelajaran Malaysia; Kuala Lumpur (1969).

⁴³ " In practice, the Malaysian Parliament is a rubber stamp for the BN (National Front). Legislation is rarely properly debated.... and the BN backbenchers are too scared to stand up, even when they disagree with government legislation." G Lim; *Parliamentary Reform. Lessons from the UK and Europe*; <http://www.malaysia.net/aliran/monthly/2002>

⁴⁴ See supra Chapter on 'Parliament's Role in Scrutinising the Executive.'

⁴⁵ Harding, Andrew op cit 8 at p85-86

⁴⁶ ' Furthermore, much legislation is passed with great rapidity: an extreme case was the Constitution and Malaysia (Singapore Amendment) Act 1965...was passed by both Houses in the alarming short period of three hours.' Ibid

⁴⁷ Milne, RS & Mauzy, Diane K; *Politics and Government in Malaysia*; Times Books International; Singapore (1978) at p 234-236.

sufficient time to study and debate on the bills. In extreme cases, Members of Parliament will get to know of the bill and its contents only a few hours before the bills are debated. For example, in the Constitution and Malaysia (Singapore Amendment Act) of 1965, Members of Parliament were notified of the bill on the same day that it was debated. Similarly the Constitution of Sarawak was amended by an Emergency Act in 1966 without any notice nor consultation given to the Members of Parliament of Sarawak.⁴⁸

The application of party whips has therefore effectively prevented the Legislature from questioning and if necessary dictating and controlling the contents of the bill. In a recent incident, the Members of the State Assembly of Penang for Datuk Keramat, Lim Boo Chang and Jawi, Tan Cheng Liang were both threaten with disciplinary action from the Malayan Chinese Association because they chose to abstain from voting against a motion tabled by the Opposition at the Penang State Assembly. They were both finally suspended from the party indefinitely.⁴⁹ The Executive using the party whip system at its disposal is now able to control and dominate the will of the Legislature in the law making process.

‘...now the Whips are ‘put on’ whenever Government policy is concerned, so as to show their supporters that they are expect to follow obediently. And this form of coercion is very effective. The result is this, it is concluded, is to reduce the House in matters of Government policy to a registration chamber; the debate is unreal because it never changes a vote; whatever the arguments, the result of the division is known beforehand.’⁵⁰

⁴⁸ Harding, Andrew op cit 8 at p85. See also Milne R.S. and Mauzy Diane K op cit 47 at p235-236

⁴⁹ *The Star*, November 27, 2002 and *The Sun*, November 27, 2002.

⁵⁰ *Cambridge University Press (ed). British Government since 1918*, Allen and Unwin (1950) at p 15-21

(d) Dewan Negara

As regards the Dewan Negara, the one party dominated government has filled its seats with party supporters and or sympathisers so as to ensure the smooth passage of government bills.⁵¹

The combination of various factors mention herein above has created a Legislature that is made beholden to the will of the Executive. Thus, a learned author once wrote:

“And here it is plain that, whatever theory may say, Parliament has next to no independent control over either legislation or taxation. It is the Government, not Parliament that the man in the street blames for bad laws and heavy taxes. And he is right, for, by modern usage, the Government frames all important legislation...carrying them by the voting-power of its supporters in Parliament, who will risk the loss of their seats if they do not vote steadily for the Government they have been elected to support...”⁵²

The doctrine of Separation of Powers between the Legislature and the Executive, where the Executive ought to obtain the consent of the Legislature on its proposal and that the Legislature ought to be able to provide an effective check on the Executive is emptied out of its meaning.

“ We are thus justified in saying that the most distinctive feature of the [Westminster model][italics mine] system is the concentration of all power and all responsibility, administrative, legislative.... in the hands of ‘the Government’, so long as it commands a majority in the House of Commons.”⁵³

⁵¹ Harry E. Groves; *The Constitution of Malaysia*, Malaysia Publications Ltd, Singapore (1964) Also ‘Dato Onn alleged that, in spite of what the Constitution said, many of the members had not distinguished themselves in any way-except possibly in regard to their pockets.’ R.S.Milne; *Government and Politics in Malaysia*; The University of British Columbia; p 127.

⁵² Muir, Ramsay, *How Britain is Governed*, Constable (1930), Introduction.

⁵³ Id at pp 23-26.

Strengthening Separation of Powers

To prevent the Executive from dominating the Legislature during its legislative sessions, in particular voting, it is submitted that the application of party whips should be abolished. Instead, members of Parliament should be left to vote on the bills independently, without any compulsion from the Executive.

The idea to abolish the application of party whips it is submitted would not result in a delay of bills passing through Parliament due to the following reasons.

Legislators and the Executive arm (Prime Minister and Cabinet here) have at least three common interests; they are winning elections, shaping public policies and attaining influence within the Legislature.⁵⁴ To achieve these goals, members from the Legislature and Executive may have to assist or bargain with one another. Bargaining is a generic term that refers to several related types of behaviour. In each case an exchange takes place: goals or resources pass from a bargainer's hands in return for other goals or resources that he values. The process of bargaining⁵⁵ therefore strengthens the doctrine of Separation of Powers because it prevents one body from dominating the other and it allows both the Legislature and Executive to effectively and constantly check on one another.

Bargaining between the Legislature and Executive may take any one of the forms: -

- (a) an implicit bargaining occurs where Legislators or the Executive initiate actions designed to elicit certain reaction from others, even though no negotiation may have taken place or when Legislators seek out or accept the judgements of colleagues with expertise on a given matter, expecting that the situation will be reversed in the future,⁵⁶ or

⁵⁴ Davidson H. Roger and Oleszek J. Walter op cit 23 at p 308

⁵⁵ Id at p 282

⁵⁶ Id at p 282

(b) an explicit bargaining occurs where compromises are made between the Legislators themselves or between the Legislators and the Executive and the differences are finally iron out amongst themselves,⁵⁷ or

(c) logrolling, which is a form of bargaining in which individual parties support the other although it may not benefit that party personally in order that each may finally gain its goal.⁵⁸

It must be borne in mind the methods of bargaining proposed herein may be applied effectively into the Malaysian Parliament today in view of the fact that the mindset of today's Malaysian society (which is issue based) is radically different from the time of independence, which was then race based.⁵⁹

If the method of election which is proposed in the earlier chapter⁶⁰ is adopted, this would effectively sever the dependence of Members of Parliament from their respective political parties and their leaders.⁶¹ Such severance may in turn increase the effectiveness of the proposed methods of bargaining between the Legislature and the Executive thereby strengthening the doctrine of Separation of Powers between the two organs.

Based on the composition of the Dewan Negara proposed in the earlier chapter,⁶² it is justifiable that the powers of the Dewan Negara in the process of legislative scrutiny should be increased. Such additional powers granted to the Dewan Negara, it is submitted would strengthen the doctrine of Separation of Powers between the Legislature and the Executive.

⁵⁷ Ibid

⁵⁸ Id at p 283

⁵⁹ See supra Chapter entitled *Parliament's Composition – A Critical Analysis of the Dewan Rakyat*,

⁶⁰ Ibid

⁶¹ Ibid

⁶² See supra Chapter entitled *Parliament's Composition - A critical analysis of the Dewan Negara (Senate)*.

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⁵⁷ Ibid

⁵⁸ Id at p 283

⁵⁹ See supra Chapter entitled *Parliament's Composition - A Critical Analysis of the Dewan Rakyat*,

⁶⁰ Ibid

⁶¹ Ibid

⁶² See supra Chapter entitled *Parliament's Composition - A critical analysis of the Dewan Negara (Senate)*.

The Dewan Negara's powers in relation to the legislative process could be strengthened if the Dewan Negara is armed with a qualified veto power, subject to an override by a two- third majority of the Dewan Rakyat. The proposed qualified veto should be applicable for all bills that are introduced in Parliament, irrespective whether it is a mere legislative bill⁶³ or bills to amend the constitution.⁶⁴ Such qualified veto power would be akin to a presidential veto in the American system of government.⁶⁵

Besides the presidential veto, which is the proposal made to the Dewan Negara, the American President may also veto the bills pass by Congress in various ways. His veto powers amongst others include the pocket veto, where if Congress passes legislation in the last ten days before an adjournment, the President can, as it were keep it in his pocket until Congress adjourns. By this means he can effectively kill a bill without formal use of his power of veto.⁶⁶ The President of the United States is also constitutionally armed with the line-item veto which allows the president to veto items selectively without rejecting the whole.⁶⁷

⁶³ Chapter 5 of Part IV of the Federal Constitution and Standing Order 45(1) which requires the decisions of the Dewan Rakyat to be made by a simple majority of members that are voting. See *Standing Orders of the Dewan Rakyat* (10th ed)(1998), Percetakan Nasional Malaysia Berhad

⁶⁴ Article 159 Federal Constitution

⁶⁵ The veto, as an instrument to prevent or postpone governmental action, is exercised today on many fronts. The framers of the United States Constitution originally proposed an absolute executive veto but this was ruled out by the states (ten states voting against it and not a single one in favor. This resulted in the president receiving a qualified veto, which is subjected to an override of a two thirds majority of each house of Congress. Fisher, Louis, *The Constitution Between Friends, Congress, the President, and the Law*, New York, St Martin's Press (1978) at p83

⁶⁶ The United States Constitution provides that any bill not returned by the President " within ten days (Sunday excepted) shall become law " unless the Congress by their Adjournment prevent its Return, in which Case it shall not be law. This instrument known as the 'pocket veto', was first used in 1812 by President Madison. Fisher, Louis op cit 23 at p 96. See also explanations of 'pocket veto in Davidson H. Roger and Oleszek J. Walter op cit 23 at p298-300 and Bradshaw, Kenneth and Pring, David op cit 18 at p289.

⁶⁷ The line-item veto would permit the president to veto items selectively without rejecting the whole bill. Fisher, Louis op cit 23 at p 90. See also explanations of 'line item veto in Davidson H. Roger and Oleszek J. Walter op cit 23 at p300 &302.

The proposed qualified veto for the Dewan Negara has dual advantages: -

Firstly, the qualified veto would prevent the Executive from riding roughshod over the Legislature with its bill.⁶⁸ Since the Executive wields a strong influence in the Dewan Rakyat, the qualified veto of the Dewan Negara would act as a restraint on the Executive. Such a view was clearly expressed by Hamilton, being one of the founding fathers to the American Constitution as follows: -

“[*The qualified veto acts as*][italics mine] an additional security against the enactment of improper laws. It established a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.”⁶⁹

Secondly, the qualified veto retains the supremacy of the Dewan Rakyat as the fully elected branch of Parliament. The Dewan Rakyat may still overrule the Dewan Negara's veto to its bills provided always that the Dewan Rakyat obtains a two third majority, which indirectly reflects the will of the majority in society.

The proposed amendments in this chapter would create a more robust and active Legislature whilst at the same time limiting the powers and dominance of the Executive by keeping them constantly in place in the legislative process. As a result, the balance of power between the Legislature and Executive in Parliament would be achieved thereby strengthening the doctrine of Separation of Powers in all its versions.

⁶⁸ Madison and Hamilton, the framers of the Constitution of the United States believed that the veto would be used for the 'protection of the integrity of [Parliament][italics mine] and the rejection of flagrantly unconstitutional legislation.' Pessen, Edward., *The Arrogant Veto*, *The Nation*, August. 30, 1975., at 133-137. Justice White in a 1976 opinion in *Buckley v Valeo*, 424 U.S. 1, 285 (1976) also claimed that the veto's principle aim was to protect [the Legislature in Parliament][italics mine] against [Executive][italics mine] encroachment.

⁶⁹ Hamilton, in *Federalist* 73

Parliament's role in scrutinising the Executive

The current methods of scrutiny which exist in the Westminster model of Parliament in various forms¹ are designed to enable the Legislature to be kept informed constantly of the administration and activities of the Executive.² These methods of scrutiny do not only provide a yardstick for the Legislature to judge whether the Executive arm should be supported or not but it also serves as a constant reminder to the Executive that their offices are constantly dependent upon the support of the majority of the Legislature.³

Although these methods of scrutiny may seem to strengthen the 'common interest version', 'accountability version', 'Rule of Law' version and 'balancing version' of the Separation of Powers theoretically, the same does not hold true in practice. It is submitted that if these methods of scrutiny are applied in relation to the different Articles of the Federal Constitution, the structure of government in Malaysia and the impact of developed mass based political parties on the composition of the Dewan Rakyat and Dewan Negara, all but the 'efficiency version' of the Separation of Powers would be diluted. This is because the relevant articles in the Federal Constitution, in particular Article 63(4), which appears to give Parliament the absolute right to determine the extend of freedom of speech in Malaysia coupled with the parliamentary form of government and the inherent defects in the committee system within Parliament has created various

¹ The various checks which are available for the Legislature to check on the Executive includes Question Time (both Prime Ministerial and Ministerial) and Private Notice Questions, the various forms of debate for example, Adjournment Debates, Daily Adjournment Debates, Early Day Motions and Opposition Days, the machinery of select committees and the vote of no confidence. Barnett, Hilaire, *Constitutional and Administrative Law*, Cavendish Publishing, 3rd Ed (2000) p611-p63. See also Ahmad Bin Abdullah, *The Malaysian Parliament (Practice and Procedure)*, Dewan Bahasa Dan Pustaka (1969) at pgs 55-63, pgs 78-103 and pgs 141-149.

² Bradshaw, Kenneth and Pring, David., *Parliament And Congress*, Constable, London (1972) at p355. The learned authors used the term 'oversight' which Parliament has over the Executive to enable Parliament to keep itself informed of the activities of the Executive.

³ Id. 356

opportunities for the leaders of the political party who occupy the positions within the Executive to dominate and control the Legislature. This will be demonstrated in the rest of this chapter.

Article 63(4) of the Federal Constitution

The privileges and immunities which are accorded to Members of Parliament and are enshrined in the Federal Constitution are limited⁴ since these privileges and immunities are not applicable to Members of Parliament who are charged with laws passed pursuant to Article 10(4)⁵ and the Sedition Act 1948.⁶

Besides taking various measures, which included the creation of the National Operations Council, the Department of National Unity, the National Consultative Council and the creation of the national ideology called the Rukunegara pursuant to the race riots of May 13, 1969 in Malaysia⁷ the Government of the day, which was the Alliance then also took action to curtail and restrict the privileges and immunities that were granted to Members of the Malaysian Parliament. These measures, which included the respective statutory

⁴ 'Clause (2) [which grants immunities to Members of Parliament from proceedings in court from anything said or vote given by him in Parliament] shall not apply to any person charged with an offence under the law passed by Parliament under Clause (4) or Article 10 or with an offence under the Sedition Act 1948 as amended by the Emergency (Essential Powers) Ordinance No. 45 1970.' Article 63(4) Federal Constitution.

⁵ Sub-clause (4) to Article 10 of the Federal Constitution which deals with the freedom of speech was added in via Act A30 and was enforced on 10-3-1971. It allowed Parliament to pass any law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Constitution (citizenship), Article 152 (the National language), Article 153 (special position of the Malays and the legitimate interests of the other communities) or Article 181 (the sovereignty of the Rulers). Milne, RS & Mauzy, Diane K, *Politics and Government in Malaysia*, Federal Publications (1978) at p96.

⁶ The provisions of the Sedition Act as amended by the Emergency Ordinance No. 45 of 1970 widened the scope of sedition to include matters which 'produce or having a tendency to produce feelings of ill-will and enmity between the different races or classes of the population of Malaysia.' Crouch, Harold., *Government and Society in Malaysia*, Cornell University Press, Ithaca And London (1996) at p 82-83. See also Milne, RS & Mauzy, Diane K op cit 5 at p 96-97.

⁷ The government of the day, the Alliance took several actions to stop the racial riots as well as preventive measures to prevent any reoccurrence of the same. The measures taken by the government besides amending the Federal Constitution and the Sedition Act. Gordan P. Means, *Malaysian Politics: The Second Generation*, Oxford University Press, Singapore (1991) p10-15. See also Esman, Milton J., *Administration and Development in Malaysia. Institution Building and Reform in a Plural Society*, Cornell University Press, Ithaca and London (1972) p44 -45 and Milne, RS & Mauzy, Diane K op cit 5 at p85-p99.

amendments⁸ were made by the Alliance government pursuant to the race riots of May 13, 1969 with the hope that by removing racial issues from any future political debate, the provocation for communal conflict will be eliminated.⁹ The Alliance government's justification for adopting the various measures which includes imposing limitations on the parliamentary system were expressed by the then Prime Minister, Tun Haji Abdul Razak, by in the following manner:

' Shall we return to the ways of the past when, in the name of democracy and freedom of speech, irresponsible elements were at liberty to forment and exploit racial emotions until we were brought to the very brink of national disintegration? Or shall we act now to deny them that freedom to forment and to exploit and, in this way, safeguard for all of us the smooth functioning of parliamentary democracy...Let us remember that the democratic system which we are working has to bear the stresses and strains of multi-racial society...*we are determined to ensure [emphasis added] the working of the parliamentary system of government suited to our present conditions.*'¹⁰

The statutory amendments which were made had not only effectively reduced the areas which the Legislature could question and scrutinise the Executive, it had also granted the Executive the ability to determine the boundaries of privileges and immunities of Members of Parliament.

⁸ Amendments to Article 10 & Sedition Act 1948.

⁹ The actions which were taken by the Alliance government were described as a 'Mutual Deterrence Model of Conflict Management.' The two main races in Malaysia, the Chinese and Malays are strong enough to inflict unacceptable damage on the other, and the majority on both sides recognise and appreciate this possibility. On the other hand, both competing parties also have incentive to cooperate in order to avoid mutual destruction. To achieve such balance, a third party, the government elite is involve to ensure that the possibility of communal conflict is avoided by the various systems of guidance which the government will place. Esman, Milton J, op cit 7 at p 261-266.

¹⁰ Tun Haji Abdul Razak, *Unite for Peace and Prosperity*, speech at second reading of the Constitutional Amendment Bill at Dewan Rakyat on 23 February 1971 (Kuala Lumpur: Jabatan Penerangan, 1971), p16-17.

The fact that Article 10(4) expressly states that "...Parliament may pass any law" implies that Parliament is the sole arbiter on the content of speech in Malaysia, including that of its Members.¹¹ Within the context of the Malaysian Westminster model of Parliament, which comprises of members from mass based political parties that practice strict discipline on its members,¹² it is submitted that the Executive is able to effectively prevent the Legislature from questioning and scrutinising its actions by controlling and determining the areas of free speech which is exercised in Parliament via the passing of Acts of Parliament.

Furthermore, the widened scope of the amended Sedition Act 1948 is able to prevent any speech which touches upon any sensitive issue even if 'it was intended to be a criticism of the Government policy or administration with a view to obtain its change or reform.'¹³

Armed with the ability to determine the boundaries of the freedom of speech in Parliament and the extended scope of the Sedition Act, the Executive is therefore able to effectively limit and if necessary prevent the Legislature from scrutinising its actions. The existence of such provisions dilutes the impact of the doctrine of Separation of Powers, in particular the 'common interest version', 'accountability version', 'Rule of Law' version and 'balancing version.'

¹¹ Chin Thye, Choo., *Limiting The Restrictions On The Right Of Free Speech In Malaysia., A Misguided Legacy*, LLM Comparative Constitutional Law Seminar Paper, Faculty of Law, University of Malaya, 2001 at p 20.

¹² Through the mechanics of party whips. See supra Chapter entitled *Parliament's Law Making Function – A Critical Analysis*.

¹³ HP Lee was of the opinion that under the amended Sedition Act, the moment a speech even has a tendency to touch upon any of the 'sensitive issues' it is deemed to be seditious and be automatically caught by the Sedition Act. Lee, HP, *Constitutional Conflicts in Contemporary Malaysia*. Oxford University Press, (1995) p113-p114.

A case for dismantling Article 63(4).

In view of the possible abuses which the Executive may utilise to prevent any effective Legislative scrutiny on it, it is submitted that Article 63(4) should be repealed in light of today's political and social circumstances. Four reasons are offered in support of the submission: -

Although racial issues rears its ugly head in Malaysian society today, such incidents it is submitted forms more of an exception than a norm. An example of a recent conflict which turned on racial issues recently included the appeals (known as the 17-Point Election Appeal) which was submitted by Suqiu, an umbrella organisation which comprises of a group of 11 Chinese organisations to the Barisan Nasional government. When some of the appeals in the said 17-Point Election Appeal were misinterpreted as a challenge against the special rights of the Malays, this altered Suqiu's appeal to one of a racial challenge.¹⁴ The shift in racial issues from an issue which dominates the Malaysian society to one which is now an exception may be attributed to the fact that today's Malaysian society has by and large progressed from a 'raced based' society to an 'issue base' society.¹⁵ As such, the constitutional and legislative amendments, which were

¹⁴ 'Suqiu's (which comprised of a group of 11 Chinese organisations) submitted several 'appeals' to the Barisan Nasional Government (known as the 17-Point Election Appeal). They included issues like fair and equitable economic policies, development of Chinese schools, protection of human rights and the restoration of constitutional democracy amongst others. (Loh, Francis, *The Nanyang Takeover Crisis* at <http://www.malaysia.net/aliran/monthly/2001/5b.html> and Ramakrishnan P, *Suqiu and Malay Rights: What is the fuss about.*, at <http://www.malaysia.net/aliran/monthly/2000/10b.html>. However, some appeals in the said 17-Point Election Appeal were interpreted (or rather misinterpreted) as a challenged against the special rights of the Malays. This altered 'Suqiu's appeal to one of a racial challenge. Besides 'Suqiu's appeal, other issues which had racial undertone, such as the relocation of the SRJK Damansara (C) Primary School, which many parents and students opposed and the failure to admit approximately 500 Chinese 'top-scorers' into the public universities and the government's insistence to implement 'Vision Schools' may have collectively contributed to and climaxed at the Lunas by-election. The Lunas by-election saw the decisive Chinese voters swinging towards the Opposition, causing the Barisan Nasional to lose its two-thirds majority in the Kedah State Assembly. (Loh, Francis, *The Nanyang Takeover Crisis* at <http://www.malaysia.net/aliran/monthly/2001/5b.html>. and Netto, Anil, *Lunas: A New Era Begins*, at <http://www.malaysia.net/aliran/monthly/2000/08f.html>.)

¹⁵ See supra chapter entitled *Parliament's Composition – A Critical Analysis of the Dewan Rakyat* for the grounds presented in support of such change to the mentality of Malaysian society.

enacted as a reaction to the racial riots of May 13, 1969, it is submitted, may not be applicable in today's Parliament. Such a view was aptly expressed by a Member of Parliament in the following way:

'The 1970 generation of Malaysians of all races is vastly different from the old 1957 generation. They constitute a majority. Their wants, hopes, are also different: and the world they live in at home and abroad is no longer the same. *No generation has the right to dictate to the future generation as yet unborn or not ready to vote what precisely their political destiny must be.* [emphasis added].'¹⁶

Secondly, the vision of the Prime Minister himself, Dr. Mahathir had radically changed from one which sees the threat as racial, that is, one coming from within the community to a threat which is global, that is coming externally from other countries.¹⁷ Such global vision, it is submitted goes beyond the racial differences in Malaysia and is indicative of the fact that racial issues no longer dominate Malaysian politics.

Thirdly, it is submitted that there are adequate provisions in the Federal Constitution, for example Article 63(5) and Article 72(5) of the Federal Constitution¹⁸ and the current list of legislation, which includes S8 (2) of the Internal Security Act of 1960 and S3 (2) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO)¹⁹ to

¹⁶ The DAP denied that the questioning of Malay special rights or the status of the National language or citizenship provisions had sparked off the May 13th incidents. In effect, it also queried whether the Constitution or the 'bargain,' should be binding on a different generation. Milne, RS & Mauzy, Diane K op cit 5 at p82

Goh Hock Guan, *Parliamentary Debates on the Constitution Amendment Bill 1971* at p84.

¹⁷ Boo Teik, Khoo, *Paradoxes of Mahatirism. An intellectual Biography of Mahathir Mohamad*, Oxford University Press (1995) at p42-47 and p80. See also supra Chapter on Parliament's Composition- A *Critical Analysis of the Dewan Rakyat*.

¹⁸ Both clauses prevent discussions on the abolition of the position of the Yang di-Pertuan Agong as the Supreme Head of the Federation or the constitutional position of the Ruler of a State, as the case may be. See also the protection given by Article 149 for both the Heads of States and protection of the different races in Malaysia respectively.

¹⁹ Other examples would include the Police Act 1967.

safeguard the position of the Rulers and the special position of the Malays together with the legitimate interests of the other communities in Malaysia. As such, the position of the Rulers and the special position of the Malays as well as other communities will not be affected if Article 63(4) is repealed.

Finally, the proposal falls in line with the Islamic notion of freedom of expression. Mohammad Hashim Kamali submits that the right of free speech and expression serves two complementary objectives in the Islamic context. They are to discover the truth [*al-haqq*]²⁰ and to uphold human dignity.²¹ The Quran and Sunnah has impliedly protected the freedom of speech²² under various areas; they include amongst others²³ the Quranic principle commanding good and forbidding evil (*hisbah*) which provides for the basic freedom of individuals to formulate and express their own opinions (*Hurriyyat al-Ra'y*) and the citizen's right to criticise government leaders (*haqq al-muaradah*)²⁴.

Thus, the individual is granted the freedom to criticise and monitor the activities of the Executive under the principle of *haqq al-muaradah* in order 'to tell the truth and expose transgression even when this entails opposing the ruling authorities.'²⁵ The criticisms

²⁰ 'Freedom of expression and the quest for truth are both normative values, each in its own right, and, as such, they are each to be pursued and upheld without detriment to the other.... the normal pattern of the relationship between these values is that they endorse one another, and each functions as an instrument for the realisation of the other.' Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Ilmiah Publishers Sdn. Bhd. (Rev Ed) (1994) at p 9-p10.

²¹ 'Freedom of expression also complements human dignity, for the essence of character and personality is reflected in a person's opinion and judgement.' Mohammad Hashim Kamali, op cit 20 at p10-p11.

²² Muhammad Asad took the view that the right to a free expression of one's opinion in speech and writing is one of the fundamental rights of a citizen in an Islamic State. Muhammad Asad., *The Principles of State and Government In Islam*, Islamic Book Trust, Malaysia (Reprint 2001) at p81-83.

²³ Other evidences of freedom of expression in Islam is found in the principle of sincere advise (*nasihah*), the principle of consultation (*shura*), and the doctrine of independent reasoning (*ijtihad*). Mohammad Hashim Kamali, op cit 20 at p26-p27.

²⁴ Id at p 26

²⁵ Afifi., *al-Mujtama al-Islami wa-Usul al-Hukm*, at p93 at footnote 75, Mohammad Hashim Kamali, op cit 20 at p110.

that are leveled against the government may come in the form of sincere advice, constructive criticism, or even ultimately by refusing to obey the government if it is guilty of violating the law. All these are corollary to the Quranic principle of commanding good and forbidding evil (*al-amr bi'l-ma'ruf wa'l-nahy 'an al-munkar*).²⁶

It is submitted that by dismantling Article 63(4) of the Federal Constitution, the areas and issues which the Legislature may question the Executive will be widen automatically. This will prevent the Executive from hiding behind the cloak of Article 10 of the Federal Constitution and the Sedition Act 1948. As a result, the Executive will be force to face and defend its policies before the Legislature which augurs well for the doctrine of Separation of Powers in particular the 'common interest version', 'accountability version', 'Rule of Law' version and 'balancing version' of the Separation of Powers.

Structure of Parliament

In addition to Article 63(4) of the Federal Constitution, the type of government which the Malaysian Parliament adopts, which is the parliamentary type of government, has also contributed to the dominance of the Executive which is almost always occupied by the leaders of the majority party in Parliament over the Legislature. This has diluted the effect of the Separation of Powers between the Executive and Legislature in all but the efficiency version.

The Westminster type of Parliamentary form of government, which Malaysia inherited substantially from the British, had prevented the Legislature from effectively scrutinising and limiting the powers of the Executive. The Westminster model of Parliamentary government of which Lord Hailsham has conveniently labelled as the 'Executature'^{26a} coupled with the existence of mass based political parties imposing strict disciplinary

²⁶ Hashim Kamali, Mohammad, op cit 20 at p50

^{26a} Lord Hailsham, *The Independence Of The Judiciary In A Democratic Society* [1978] 2 MLJ cxv at p cxvi.

measures on its members has instead allowed the Executive arm a significant, if not total control and domination over the Legislature. The Executive's dominance over the Legislature has prevented the latter from effectively scrutinising the former thereby weakening all but the efficiency version of the doctrine of Separation of Powers.

The weakness of the Malaysian Legislature in scrutinising the Executive's policies and actions are contributed by the following factors: -

Firstly, in respect of the Government, the Cabinet is usually formed from the leaders of the victorious political party whilst the party's subordinates form the majority in the Legislature.²⁷ The internal hierarchy of the party is therefore projected onto the state institution.²⁸

By transposing the entire structure of the political party into Parliament, the position of the political leader is reinforced by the prestige of his constitutional position as a Cabinet member. This increases the influence of the minister's decision although on surface the decision officially seems to be made in common. As Duverger explains:

"Instead of parliamentary representatives taking up positions of leadership in the party, it is the leaders of the party who take seats in parliament. This means that party solidarity is stronger than parliamentary solidarity. Then the inner circle leaders can utilize the prestige conferred by the status of...minister to bolster his own authority in the party: the very foundations of parliamentary power are shattered."²⁹

²⁷ Duverger, Maurice *Political Parties, Their Organisation And Activity In The Modern State*; Methuen & Co. Ltd (3rd Ed)(1964) p 403

²⁸ Id at p 404

²⁹ Duverger op cit 27 at p 261

The importance of a Cabinet member's decision is therefore determined by the position he holds in the political party rather than by the importance of the task he is allotted in the Government or his capability.

The transposition of the entire hierarchy of the political party onto the Legislature and Executive also weakens the capability of Parliament to check on the Executive since party solidarity has now become stronger than parliamentary solidarity.

The Malaysian position reflects the statement above where the heart of the Executive i.e. the Cabinet comprises of members who are either leaders or deputy leaders of the respective coalition partners in the National Front, whilst the majority of the representative in the Legislature are members of the National Front.

The status of the Malaysian Parliament, as at 11th of April 2001 reveals that out of 194 seats in the Dewan Rakyat, 192 seats belong to a political party with only one independent member. The national coalition party of the Barisan Nasional holds the majority number of seats, that is 150 whilst the remaining 42 seats were shared between the Democratic Action Party (DAP), Partai Islam Se Malaysia (PAS) and Keadilan respectively.³⁰

The Prime Minister and Deputy Prime Minister are respectively the President and Deputy President of UMNO, whilst almost all the remaining Cabinet Ministers are either presidents, deputy presidents or hold senior positions in their respective parties.³¹

³⁰ See <http://www.parlimen.gov.my/parti-umum.php>.

³¹ The Prime Minister and Deputy Prime Minister are respectively the President and Deputy President of UMNO, whilst the Minister of Domestic Trade, Minister of Defence and Minister of International Trade are the Vice President and Woman Leader of UMNO. The Minister of Transport, Works, Primary Industries and Minister in the Prime Minister's are also Presidents of their own political parties i.e. the MCA, MIC, Gerakan and United Pasokmomogun Kadazandusun Murut Organisation (UPKO). The Minister of Health, Human Resources and Housing and Local Government are respectively the Vice Presidents of MCA whilst the Minister of National Unity and Social Development, Minister of Information, Minister of Entrepreneur Development and Minister of Education are members of the Supreme Council of UMNO. <http://www.smpke.jpm.my/gov/cabinet.htm>.

In such a situation, it is submitted that any questions or checks leveled by the Legislature against the Executive will not be positively viewed in the spirit of strengthening Separation of Powers but will be negatively construed as a defiant or rebellious act against the leaders of the political party.

Secondly, a political party that dominates both the Legislative and Executive arm has the ability to dispense various rewards, via the capability of the Executive to dispense patronage and rewards. By possessing such capability, the Executive is ensured that it will receive continued loyalty and obedience from the members of the Legislature.³²

When the National Front adopted the practice of equating party positions with government positions, political hopefuls wishing to climb the ladder in both the party and government posts soon realised the significance and effectiveness of loyalty and compliance with the wishes of the political leaders in the government and parliamentary positions.³³ As a writer expressed:

“In the 1970s, the transition to the practice of basing government appointments on party positions began. Premier Abdul Razak enlarged the number of ministerships and deputy ministerships.... When political aspirants saw their contemporaries rising to the top overnight, their appetites were also whetted. Hence the big scramble for party posts.”³⁴

The capability of a dominant party government to dispense patronage as rewards for loyalty to the party in terms of various government positions has been cynically criticised by a Member of Parliament as follows: -

³² As pointed out in Chapter entitled *Parliament's Composition - A Critical Analysis of the Dewan Negara (Senate)* at footnote 20, 21 and 22 of this paper, the capability of the National Front to dispense various rewards was criticised both by Dr. Tan Chee Khoo and Dato Onn Bin Jaafar respectively.

³³ A post in UMNO commanded premium value. It could be a passport to a position in the federal government as a minister or in the state government as menteri besar or chief minister.” Ibid p36.

³⁴ Cheng Teik, Goh, *Racial Politics in Malaysia*; FEP International Sdn Bhd. (1989), p35-36.

“ For a country.... which also has a state level of government, these new additions to political hierarchy seem to be excessive. For a party with a large number of backbenchers, however, they are a useful means of providing employment. At the rate the Alliance Government is creating jobs for M.P.'s, very soon there will not be any M.P.'s left without a job from the benevolent and paternalistic government.”³⁵

Such loyalty and obedience it is submitted may include the decisions by the members' of the legislative branch not to question the policies and actions of the Executive, least they may not be considered for future positions or rewards which will be dispensed by the Executive arm.

Thirdly, the mentality of loyalty and obedience to higher authorities, which prevails amongst the Malay, Chinese and Indian representatives, allows the Legislature to accept the policies and decisions of the Executive without much or any questioning. Such mentality prevents the Legislature from effectively scrutinizing the Executive. This can be seen in Malay custom, Chinese tradition of Confucianism and South Indian mental attitudes within the Malaysian society.

As part of the Malay custom, unquestionable loyalty and obedience were traditionally given to the Sultan. The formation of UMNO merely transferred the loyalty of the Malays from the Sultan to UMNO.³⁶

³⁵ Dr. Tan Chee Khoo, Straits Times, July 10, 1964.

³⁶ In his book entitled *Protector? : An analysis of the concept and practice of loyalty in leader-led relationships within Malay Society*, (Aliaran Kesedaran Negara) (1992) Chandra Muzaffar analyses the characteristic of unquestionable loyalty in the Malay community which has existed since the time of the Malacca Sultanate. He submits in his book that when UMNO was formed to protest against the Malayan Union, the unquestionable loyalty which was given originally to the Sultan was transferred politically to UMNO; who is now seen as the substantive or effective protector of the Malay community in all aspects which include social, economical and religious aspect. See in particular chapter entitled *Structures and Historical Development of Political Parties*.

“Fatalism” is another characteristic in the Malay’s attitude of life³⁷ which “makes acceptance of everything whether good or bad, possible with unprotesting tolerance and resignation.”³⁸ It also “does not encourage resistance and certainly it does not engender a rebellious spirit.”³⁹

For the Chinese, loyalty and obedience, it is submitted is rooted firstly in the Chinese tradition of Confucianism, ‘where family virtues are transformed into political virtue and filial piety towards parents is transformed into loyalty to the sovereign’⁴⁰ or *party leader* [*italics mine*]. As Chan Heng Chee observes,

“It would appear that this system of government [*or leadership*][*italics mine*] which is both authoritarian and paternalistic seems to respond to the notions of good government [*or leadership*][*italics mine*] for the people reared in the Chinese cultural tradition.”⁴¹

Besides the tradition of Confucianism, it is submitted that the loyalty and obedience of the Chinese are also rooted in the tradition and immigrant mindset to respect local authority, which had existed since the era of British colonialism. During the era of the British, the Chinese commercial bourgeoisie were structurally hierarchical and unitary with each lower strata being totally dependent on the upper strata. At the apex lies the Chinese merchants who are wholesalers and who also had monopoly rights on opium,

³⁷ Cheng Teik, Goh, op cit 34 at p18

³⁸ Mahathir Mohamad, *The Malay Dilemma*, Kuala Lumpur, (1981) p158

³⁹ Ibid

⁴⁰ Heng Chee, Chan ‘*The Dynamics of One Party Dominance. The PAP at the Grass-roots.*’ Singapore University Press (1976).

⁴¹ Id p 231

drinking and gambling. Below it are the merchants comprising of the retailers and shopkeepers and at the base lies the craftsmen, carpenters and house builders.⁴²

During the colonial period, the Indians who came to Malaya originated from South India and were mostly from the low castes.⁴³ Being from the low castes, the Southern Indians in Malaya were amongst others submissive and humble, they were non-rebellious and had docile mentality.⁴⁴ It is submitted that although some of the characteristics which were identified with the Indians of pre-*merdeka* had changed, nevertheless the submissive, non-rebellious, and docile mentality still prevails in the Malaysian Indian's mental attitudes today. Such submissive, non-rebellious, and docile mentality has merely been transferred from the British to the political leaders.

The prevailing mentality of unquestionable loyalty and obedience to higher authorities, including the Executive that is prevalent amongst the major races in Malaysia had prevented the Legislature from effectively questioning the policies and decisions of the Executive.

Fourthly, the impact of the racial riots in May 13, 1969 had amongst others resulted in various constitutional and statutory amendments, which had restricted and prevented the Legislature from effectively questioning the Executive on several matters which were discussed earlier in this chapter.⁴⁵

⁴² "An examination of the structure of the Chinese commercial bourgeoisie is important for an understanding of the nature of class alliance in the struggles ahead." A detailed examination of the system can be found in the book by Hua Wu Yin entitled *Class and Communalism in Malaysia-Politics in a Dependent Capitalist State*; Zen Books Ltd (1983) at p 53-54

⁴³ Sinnappan, Paul, *The Case Study of Organizing the Poor in Malaysia Through Credit Unions*. A paper presented at the Asian Regional Conference jointly organized by INASIA and CDF from 27th-30th November 2000 at <http://dhaka.inasia.lk/resources/document/pdf/paper16.pdf> at p 12

⁴⁴ Sir Fredrick Weld, the then Resident General of Malaya noted that the Tamils had the following characteristics which the British were looking for. The characteristics were as follows: hardworking, accepts low wage, uneducated, ignorant, no ambitions for the future, won't rebel, submissive and humble, no business interest, no unity and docile mentality. *Royal Labour Commission* 1890, paragraph 452. id at p13

⁴⁵ The amendments included that to Article 63(4), Article 10(4) and amendments to the Sedition Act 1948.

Fifthly, the effectiveness of the Opposition's constitutional role to constantly question, probe and attempt to embarrass the government of the day by calling the government into account and to stake its claim as the alternative government. Such conduct ensures that the Executive is kept accountable to Parliament for its policies and actions. In view of the fact that the majority representatives in Parliament originate from the same political party as the government, the Opposition's presence helps to strengthen the doctrine of Separation of Powers.

However, the effectiveness of the Opposition in executing its constitutional duties would depend by and large upon the organisation within the Opposition parties themselves.

A multi-partisan type⁴⁶ of Opposition within a Legislature weakens the Opposition because it tends to be demagogic. In a multi-partisan type of Opposition, the political activity of one political party is relatively isolated and sealed off from one another. The Opposition parties themselves do not agree upon one supreme issue. Here, the Opposition parties indulged in unlimited criticisms and promises independently of one another. This would result in a confused and weak Opposition.⁴⁷

Conversely, a unified Opposition under a two party system on the other hand creates a strong Opposition thereby turning the Opposition into a real institution.⁴⁸ Unity exists in the Opposition not only externally, ie, as a distinct organisational machinery and but also within the opposition parties themselves, ie, a sense of unity also exists within the opposition parties themselves. Unlike individual opposition parties fighting their own causes, a unified Opposition party is able to be focused and operate in the same direction. By so doing, the opposition parties are also able to give the public a clearer and more

⁴⁶ Multi-partisan arises from the mutual independence of sets of antitheses. It presupposes that the different sectors of political activity are relatively isolated and sealed off from one another. They do not agree upon one supreme issue. Duverger op cit 27 at p233.

⁴⁷ Duverger op cit 27 at p415.

⁴⁸ Id at p 414

accurate choice, ie the public is better able to see the different views offered by the majority and minority.⁴⁹

Although the Malaysian Parliament is structurally shaped in a rectangular chamber reflecting the adversarial mode of the two-party system, in practise however, Malaysia practises the "one party dominance"⁵⁰ which it is submitted is dominated by the National Front.

The Opposition in Malaysia is by and large generally multi partisan. The opposition parties have always disagreed amongst themselves on various issues, for example in the 1974 General Election, there was a "bitter feud" which existed between the then Opposition parties of DAP and Pekemas. They spent their electoral energy attacking each other rather than the National Front which resulted in all the National Front's candidate being challenged by at least two opponents each. The resulting split in votes favoured the Front.⁵¹ In contrast to the Opposition in Malaysia, the National Front has always since the time when Malaya was bargaining for her independence until to date showed and reflected a united front. The disagreements amongst the opposition parties reflect badly on the strength of the Malaysian Opposition as they have failed to "act as a credible alternative to the ruling party". As a result, have merely been reduced to only pressurising, criticising and influencing the government.⁵²

Although the Opposition in Malaysia had recently formed a loose coalition which was self proclaimed as the '*Barisan Alternatif*' or the 'Alternative Front' in order that they

⁴⁹ Id at p 415

⁵⁰ Milne R.S., *Government and Politics and Malaysia*, The University of British Columbia; Houghton Mifflin Co. Boston p107

⁵¹ Musolf, D. Lloyd and Springer, Frederick J, *Malaysia's Parliamentary System: Representative Politics and Policymaking in a Divided Society*, Westview Press at p85. The opposition parties have been constantly involved in various disagreements between them, the latest being the issue whether Malaysia should be an Islamic State. Again we see a dispute at hand between the DAP and PAS.

⁵² Milne R.S. op cit 50 at p107

could mount a credible challenge against the ruling National Front, the partnership within all the different opposition parties in Malaysia lasted for only a brief moment. Formed before November 1999,^{52a} the various disagreements within the political parties of the '*Barisan Alternatif*' that plagued the coalition from year 2000 onwards had deeply affected the partnership within the '*Barisan Alternatif*.' An example of these disagreements which had affected the parties within the '*Barisan Alternatif*' is the nomination of candidate to contest a by-election in the Lunas constituency ('Lunas by-election'). As a result of the disagreement between the parties of the '*Barisan Alternatif*' on the choice of candidates which is to be nominated, a prominent opposition leader within the coalition party resigned from his post.^{52b}

The various reasons are, the various disagreements which appears within the opposition coalition parties, the fact that the *Barisan Alternatif* has not yet develop a culture of consultation with their grassroots and between the parties themselves (unlike the 'National Front') and the fact that the political parties of the *Barisan Alternatif* has not gotten their priorities right as yet has made the *Barisan Alternatif* merely an election machinery and not an organised and credible opposition.^{53c}

The weakness of the Opposition is compounded by the fact that most of the individual opposition parties represent specific races in the Malaysian society whereas the ruling coalition party is able to represent all the major races in Malaysia.

^{52a} See *What is Hot in Malaysia Politics* at <http://www.gerakan.org.my/press>. The Barisan Alternative campaigned under a common Joint Manifesto which proclaimed that it could accommodate PAS's Islam, DAP's 'Malaysian Malaysia', PRM's social democracy and Keadilan's social justice.' See Boo Teik Khoo, 'Can There Be Reformasi Beyond BA?' at <http://www.malaysia.net/aliran/monthly/2002>.

^{52b} Tian Chua, the vice president of Keadilan resigned from his post following a dispute with the DAP over the choice of the opposition's candidate in the Lunas by-election. AFP's report on November 19, 2000 entitled '*Malaysia's Opposition Alliance Split Amid Inter-Party Squabble*' and BBC's report on November 20, 2000 entitled '*Prominent Malaysian Opposition Leader Quits*' both at <http://www.gerakan.org.my/press>.

The other contributing factor to the weakness of the Malaysian Opposition lies in the fact that the opposition parties are in fact incapable to act as the alternative to the ruling party since they had never form the government in Malaysia at all since independence.

Duverger is of the opinion that if domination by one party is prolonged, the opposition is reduced to impotence and this may result in the country gradually losing its interest in political campaigns and elections, because they are ineffective.⁵³

Is it submitted that since the National Front has been winning most of the elections in Malaysia since independence by at least a two third majority, the Malaysian Opposition has proven itself to be a sterile opposition, incapable of mounting any credible challenge to the ruling coalition of the National Front, thus affecting the capability of the Legislature to check on the Executive.

Furthermore, it is submitted that a prolong effect of the ruling coalition in government has created a fixed mindset in the Malaysian society that only the National Front is capable of ruling Malaysia. Because of such limited experience, Malaysian society cannot fathom the possibility of being ruled by other political parties besides the ruling National Front. Such a situation discourages the growth of the Opposition.⁵⁴

Chan Heng Chee lamenting on the state of the Opposition in Parliament stated:

“ It is both discouraging to opposition and injurious to its action when one heavily dominant party appears to be immovable. People do not like to back a certain loser and the opposition parties are bound to become discouraged

^{53c} “ There is a critical need for the *Barisan Alternatif* to operate as a political mobilization machinery and not merely an election machinery. Unfortunately, this transformation is not taking place.’ FAC News., *A Revolt Is Brewing In The Opposition Coalition (Part 6)* at <http://www.freeanwar.com/jan2002/facnews>

⁵³ Id at p 417

⁵⁴ Heng Chee, Chan op cit 40 at p218

and desperate under these conditions. Discouragement about their prospects of growth not only keeps them small, it also makes them smaller by stirring up jealousies and disputes which are endemic in failing organizations.”

In view of the fact that the parliamentary structure which Malaysia adopts has reduced the ability of the Legislature to scrutinise the Executive, it is submitted that the Islamic concept of ‘Shura’ may strengthen the position of the Legislature vis a vis Executive.

An Islamic Answer

In addition to the various proposals which were presented in this paper⁵⁵ to address the several defects mentioned hereinabove, it is submitted that the dominance and power of the Executive over the Legislature could be further limited if the Executive is compelled to consult the Legislature on its policies and actions.

To achieve this aim, it is submitted that the Islamic principle of *shura* [consultation]⁵⁶ should be adopted into the Malaysian Parliament where the head of the state is required to consult the government leaders and community members before they conduct any community affairs.

⁵⁵ This includes the proposals on the nomination and election of candidates in to the Dewan Rakyat, the proposals on the composition of Dewan Negara into directly elected members and members which are appointed by the Yang di-Pertuan Agong personally as well as the proposal to amongst others repeal Article 63(4) of the Federal Constitution. All these proposals are found in the Chapters entitled *Parliament's Composition-A Critical Analysis of the Dewan Rakyat*, *Parliament's Composition-A Critical Analysis of the Dewan Negara*, *Parliament's Composition -Criticism on the Methods of Disqualification*, *Parliament's Law Making Function- A Critical Analysis*.

⁵⁶ ‘Being one of the salient principles of government prescribed in the Quran, *shura* requires the head of the state and government leaders to conduct community affairs through consultation with the community members.’ Hashim Kamali, Mohammad, op cit 20 at p40.

Sadek Jawad Sulaiman argued that *shura* as a basis for democratic government should mean ‘a binding decision-making process’ that is predicated on equality among those consulting in order to arrive at a collective decision. Sulaiman, Sadek Jawad., *The Shura Principle in Islam* at <http://www.alhewar.com/SadekShura.htm>

Under the Islamic principle of *shura*, the government [Executive] is imposed with a duty to solicit counsel from everyone in the conduct of its community affairs.⁵⁷ By applying the principle of *shura* into the Malaysian context, it is submitted that the Executive could be compelled to consult with the members of the Legislature in matters of its policies and action therefore tempering the dominance and power of the Executive in a parliamentary style of government.

Furthermore, it is submitted that the Executive should not only pay lip service to the principle of *shura* by merely consulting the Legislature but the Executive should be compelled to allow members of the Legislature to enjoy total freedom to express their views during the process of consultation.⁵⁸

The implementation of the Islamic principle of *shura* on the Executive brings about various advantages: -

Firstly, it ensures that the actions of the Executive are brought forth and discussed before the Legislature, thereby ensuring that the affairs of the government are properly implemented.⁵⁹

Secondly, the strength of *shura* lies in the fact that consultation brings people (the Executive and Legislature in this context) closer, thus creating unity within Parliament.⁶⁰

⁵⁷ Hashim Kamali, Mohammad, op cit 20 at p43

⁵⁸ Mahmud Shaltut and al-Sibai merely reiterate this truism when they say that the Quranic principle of consultation takes for granted the freedom of speech and expression for those whose counsel is being solicited. Shaltut., *al-Islam Aqidah wa-Shariah.*, at p556; al-Sibai, *Ishtirakiyyah*, p5 cited in Hashim Kamali, Mohammad, op cit 20.

⁵⁹ Rida., *Tarikh al-Ustadh al-Imam Muhammad Abduh*, II, 207: Abu Habib, Darasah p 642, p5 cited in Hashim Kamali, Mohammad, op cit 20

⁶⁰ Hashim Kamali, Mohammad, op cit 20 at p42

In this way *shura* prevents disunity and division among people. Al-Bahi, *al-Din wa'lDawlah*, p388

Thirdly, the principle of *shura* falls in line with the Islamic principle of *nasihah* (sincere advise).⁶¹ In the context of the Malaysian Parliament, it is submitted that the Legislature should be giving *nasihah* (*sincere advise*) to the Executive courteously, constantly reminding or alerting the Executive of their duties to the people.⁶²

It is submitted that if the principle of *shura* is implement into the Malaysian Parliament, together with the various proposal which were made in the earlier part of this dissertation, the Legislature will be able to regain its effectiveness in scrutinising the policies and actions of the Executive. This would promote the doctrine of Separation of Powers in particular the 'accountability version' and 'Rule of Law' version as the Executive is compelled to bring forth its policies which will constantly be question by the Legislature which it has to constantly defend.

Select Committees

The weaknesses of the committee system in the Malaysian Parliament as indicated in the earlier part of this chapter has also contributed to the increasing dominance of the Executive's influence over the Legislature which is occupied mostly by subordinate members of the political party.

The existence of the committee system in Parliament particularly the select committee which was created 'to advise; to inquire; to administer; to legislate; to negotiate; and to scrutinize and control' the Executive's action has created various advantages for the Legislature to scrutinise the Executive.⁶³ In particular, the committee system has enabled the Legislative arm to continuously examine the functions of the Executive closely, a function which Parliament has found it impossible to execute because of its increasing

⁶¹ *Nasihah* is 'sincere advise, friendly admonishment and friendly reminder. Hashim Kamali, Mohammad, op cit 20 at p34

⁶² Id at p40

⁶³ The six basic roles in Parliamentary Committees are 'to advise; to inquire; to administer; to legislate; to negotiate; and to scrutinize and control.' K.C. Wheare, *Government by Committee: An Essay on the British Constitution*, Oxford., Clarendon(1965)

workload and commitments.⁶⁴ The existence of select committees via its reports which brings into light the various defects in the policies and procedures of the Executive, has also directly increased the importance and effectiveness of other existing methods of scrutiny in Parliament, for example Question Time and the various forms of debates.

Although the existence of select committees theoretically allows the Legislature some measure of control over the Executive, thus creating a healthy tension between the Executive and Legislature, in practice, it is submitted that the effectiveness of select committees are largely dependent upon its composition and the powers it possess. It therefore follows that if the select committees of Parliament are weak in their composition and powers, the doctrine of Separation of Powers in particular the 'common interest version', 'accountability version', 'Rule of Law' version and 'balancing version' will only be complied with structurally but not in practice.

Select Committees in the Malaysian Parliament.

A learned author once observed that the identity of a Parliament, which includes their select committees 'tend to be rooted in the cultural identity of the populace as much as in the particular constitutional, statutory and procedural instruments which govern them.'⁶⁵ In the context of the select committees in the Malaysian Parliament, it is submitted that the select committees are not limited in their scope of investigation but are further weakened in terms of their composition.

Firstly, it must be noted that the existences of select committees are not recognised by the Federal Constitution and the laws in Malaysia. The Federal Constitution has in fact expressly given Parliament the absolute discretion to control its own proceedings under

⁶⁴ K.C. Wheare, *Government by Committee*, O.U.P., (1955) p205-p206 and p209. See also H.V. Wiseman, *Parliament and the Executive, An Analysis with Reading*, London (2nd ed) (1967) at p263

⁶⁵ 'Parliamentary institutions tend to be rooted in the cultural identity of the populace as much as in the particular constitutional, statutory and procedural instruments which govern them...' Paper prepared by the National Assembly of Pakistan, p1. See also Barnhart, Gordan., *Parliamentary Committees: Enhancing Democratic Governance*., Cavendish Publishing Limited.

Article 62(1).⁶⁶ In view of this fact, it has been held in various cases that unlike statutory laws, the courts do not recognise and enforce standing orders of Parliament. This is mainly due to the doctrine of Separation of Powers which is practised between the Legislative arm and the Judicial arm of the country. A glimpse of such judicial views can be found in the decision of the Court of Appeal of Canada in *Ontario, Canada in Ontario (Speaker of the Legislative Assembly) v Ontario Human Rights Commission*. It was decided by the Court of Appeal in that case that the Ontario Legislature had the authority to establish and regulate the House's own internal affairs without interference from the other two branches of government. It was held by the court that *once it is determined that the Standing Orders are necessary for governing the House's internal affairs, then parliamentary privilege holds that no court or tribunal has the jurisdiction to question the content of those orders [italics emphasize]*. Quoting a 19th century English case to that effect, the Court of Appeal in Canada decided that an *appeal against the House's internal procedures lies to the constituents and not to the courts [italics emphasize]*.⁶⁷

The select committees of Malaysia therefore owe their existence primarily to the Standing Orders of Parliament in particular the Dewan Rakyat.⁶⁸ The fact that select committees are creatures of Standing Orders and not the former implies that the importance of select committees are not held in high regard by the Malaysian Parliament. This is evident from the fact that decisions of the Dewan Rakyat which are reached

⁶⁶ 'Subject to the provisions of this Constitution and of federal law, each House of Parliament shall regulate its own procedure.' Article 62(1)

⁶⁷ The Court Of Appeal of the Republic Of Vanuatu in *AG v Nipake Edward Natapei, Willy Jimmy and Ors* (Appeal Case No 7 of 1996) quoting *Rediffusion (Hong Kong) Ltd v A/G of Hong Kong* [1970] AC 1136, and *Cormack v Cope*, [1974] 131 CLR 432 and Megarry VC in *John v Rees* (1969) 2 All ER 363 held that the Courts do not recognise Parliamentary procedure and practise and simultaneously Parliament is not subjected to the direction of the Courts in the manner which they conduct their business. http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu_cases/Volume_A-F/AG_v_Jimmy.html

The Court of Appeal in *Ontario, Canada in Ontario (Speaker of the Legislative Assembly) v Ontario Human Rights Commission* Ontario Court of Appeal (File No. C35182), Decision: June 8, 2001 affirmed that the Legislative arm is independent of the Executive and Judicial arm at <http://www.culturalrenewal.ca/lex/lex-48.htm#4>

⁶⁸ See S.O. 76-100, *Standing Orders of the Dewan Rakyat* (10th ed), Percetakan Nasional Malaysia Berhad (1998) at p242-260

without compliance with any Standing Order need not be set aside; as is expressly stated by the Standing Order in the following manner:

‘ Where in making any decision there has been a failure on the part of the House or any Committees thereof to comply with any provision of the Standing Order in the proceeding leading to the decision, such failure shall be treated as an irregularity and shall not nullify the proceedings or the decisions resulting therefrom.’⁶⁹

Thus the Executive dominated Parliament may easily choose to ignore the Standing Orders, thereby preventing an effective check by the Legislature and the doctrine of Separation of Powers.

Secondly, the number of select committees in the Malaysian Parliament is extremely limited. In comparison to the number of select committees that exist in the United Kingdom; where they are broadly divided into financial, investigative, overseeing governmental departments, quasi judicial, domestic and legislative committees, and the United States; where there are generally seventeen and twenty- one select committees in the Senate and House of Representative respectively, there are presently only six (6) committees in the Dewan Rakyat (not including the Committee of Selection).⁷⁰

Furthermore, besides the Public Accounts Committee, the remaining select committees in the Malaysian Parliament are formed mainly to investigate and ensure that only the procedures of Parliament are followed; that is, the select committees are not investigatory but only procedural in nature.⁷¹ The existence of such committees falls far short of the

⁶⁹ S.O. No 99A

⁷⁰ They are the Public Accounts Committee, Standing Orders Committee, House Committee, Committee of Privileges, Committee to inquire into breaches of privileges and Special Select Committee. See S.O.76-S.O.81. See also Bradshaw, Kenneth and Pring, David op cit 2 at p222 and p226.

⁷¹ Besides the Public Accounts Committees, the remaining committees are formed to ensure that the procedural aspect of Parliament is followed. For example, the Standing Orders Committee is form to ensure

original purposes of the committee system, which is to provide a constant effective check by the Legislature over the Executive.

Thirdly, the composition of the select committees which reflects the balance of the political parties in the Dewan Rakyat⁷² drastically reduces the effectiveness of the Committees. In view of the fact that the Executive is represented by the leader of the majority political party in Parliament whilst the majority committee members are also members of the same political parties as that of the Minister, it would be hard for the members of the select committee to question and scrutinise the Minister. As one writer puts it:

‘...but the major problem facing parliamentary committees is political. Committee members are first of all party politicians –and they never forget it.’⁷³

Any questions leveled against the Minister may be construed as a challenge against the decisions and policies of the leaders of the political party.⁷⁴

This impact is compounded by the fact that the Standing Order requires not only that ‘Every division in a Select Committee shall be taken by the *Setiausaha* (Secretary) to the Committee asking each member of the Committee separately how the member desires to vote and *recording the votes accordingly [italics emphasize]*’ and that ‘...The *Setiausaha* to the Committee *shall enter [italics emphasize]* in the Minutes of the Proceedings the

report on matters of Standing Orders, and the House Committee is formed to consider matters which relates to the comfort, convenience, services and amenities of the House. See S.O. 78 and S.O.79.

⁷² S.O. 82(1) ‘Every Select Committee shall be so far as is practicable, the balance between the parties within the House is reflected in the Committee.’

⁷³ Weller, Patrick, *By Their Works...Parliamentary Committees And Their Reports.*, Working Papers on Parliament, Canberra Series in Administrative Studies No.5, Canberra College of Advance Education, (1979) at p 63.

⁷⁴ ‘...In many Houses, Private Members are reduced to being voting machines.’ Barnhart, Gordan, *Parliamentary Committees: Enhancing Democratic Governance*, Cavendish Publishing Limited at p40.

record of *each member's vote, and shall add a statement of the names of members who decline to vote*[italics emphasize]....' but it also requires that the decision of every member of the select committee must be recorded in the 'Minutes of Proceedings of the Committee'⁷⁵ before it is presented to the Dewan Rakyat.⁷⁶ Thus, any political party member who aspires to reach the pinnacle of his political career would not expressly state his criticism against the Minister, lest the member be passed off for any promotion by his political leader. Any member caught in the limelight due to criticism of their own government will likely never be chosen for leadership roles in the government. Banishment to the back benches for the remainder of their time in Parliament is the usual result.⁷⁷ Such a possibility prevents the Legislature, represented by the select committee from effectively scrutinising the Executive.

Fourthly the mentality of the Malays, Chinese and Indians in Malaysia which generally accepts the decisions of the leaders of their respective political parties without any or much questioning⁷⁸ also contributes to the ineffectiveness of the select committee in scrutinising the Executive.

Fifthly, the select committees in Malaysia, when they are used, never hold open public hearings; no committee develops the specialized expertise that would enable it to challenge the expertise of the bureaucracy or exercise *independent* [italics emphasize] investigative functions to make the public services directly accountable to Parliament.⁷⁹

⁷⁵ S.O. 84(1) and S.O. 84(3)

⁷⁶ S.O. 86(1) 'Every Select Committee shall make a report to the House upon the matters referred to them as soon as possible.'

⁷⁷ This...limits the members' role in committee and in the House....' Barnhart, Gordan op cit 65 at p10

'A post in UMNO commanded premium value. It could be a passport to a position in the federal government as a minister or in the state government as menteri besar or chief minister.' Cheng Teik, Goh, op cit 34 at p36

⁷⁸ See supra this chapter, subheading entitled, 'Structure of Parliament.'

⁷⁹ On the issue of inadequate parliamentary control and supervision of public enterprises in Malaysia, see: Abdullah bin Abdul Rahman, *Government and Public Enterprise in Developing Countries*., Institut Tabiran Awam Negara Malaysia., Kuala Lumpur (1982) at p131-p63.

Finally, the ineffectiveness of the select committees is also contributed by the fact that Parliament, as a whole is not compelled to discuss the reports of the select committee for the simple reason that 'Parliamentary procedure does not make specific provision for debate on reports (of select committees).' ⁸⁰ Although select committees may produce various reports highlighting the various defects of the respective government ministries or Ministers' policies and action, if these reports are not debated in Parliament, it is submitted that no action will be taken by Parliament to reprimand or caution the respective Ministers and their ministries. As such, the investigations and work done by the various select committees will be an exercise in futility because the Legislature has failed to check on the Executive.

Strengthening the Select Committees

To enhance the importance and strengthen the independence of Select Committees in Malaysia, it is submitted that the system of select committees should be incorporated into the Federal Constitution. The incorporation of the system of Select Committees together with its powers into the Federal Constitution, similar to that of the Electoral Commission⁸¹ would reduce any Executive interference as against the Select Committees, thereby simultaneously strengthening its independence in the following ways.

Firstly, Parliament will be compelled to recognise and adhere to the existence, powers and procedures of the select committee. The Executive dominated Parliament will no longer be able to ignore the existence and processes at select committees unilaterally and treat them lightly.

⁸⁰ Barnett, Hilare, op cit 1 at p628

⁸¹ The existence, composition and powers of the Election Commission is secured under Article 113 to Article 115 of the Federal Constitution.

Secondly, the courts, which is above politics will be in a better position to protect and uphold the existence and powers of the select committees since its existence is now entrenched in the Federal Constitution. Since "...every authority under the Constitution derives its power from the Constitution....*The judiciary is [therefore] constituted the ultimate interpreter of the Constitution* and to it is assigned the delicate task of *determining what is the extent and scope of the power conferred on each branch of the Government...[Italics emphasise].*"⁸²

It is submitted that if the system of select committees are recognised and accorded with constitutional protection, the legitimacy of the Legislature in scrutinising the Executive will be enhance. This would augur well for the doctrine of Separation of Powers in particular the 'common interest version', 'accountability version', 'Rule of Law' version and 'balancing version.'

To increase the effectiveness of the committee system, it is proposed that the current number of select committees should be increase to oversee every Cabinet department. Thus, the number of select committees should therefore be increased to match the number of key governmental departments.⁸³ Such a measure will be similar the select committees in the United Kingdom where each Cabinet department is scrutinise by a select committee.⁸⁴ Furthermore, as representatives of Parliament, the respective select committees should be given wide, unqualified powers and discretion to decide on the areas of investigation.⁸⁵

⁸² *Sugumar Balakrisnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289

⁸³ Barnhart, Gordan op cit 65 at p38.

⁸⁴ 'The current system of departmentally-related select committees was established in 1979 as a result of dissatisfaction with the then current arrangements for the monitoring of government department. Following a debate in the House [Of Commons] on the 19th and 20th of February 1979, the proposals for departmentally-related select committees were formed.' Barnett, Hilaire, op cit1 at p619-p620.

⁸⁵ Departmental Select Committees of the United Kingdom choose their own subjects for inquiry and set their own terms of references. Radice, Giles., *The Purpose, Function and Operation of Committees.*, (Compiled by Barnhart, Gordan) op cit 65 at p171

In terms of their powers it is proposed that the powers of all select committees should be increased. These powers should include the power to call and compel the attendance of witnesses, papers and reports which includes wider powers of inquiries, including having unqualified power to summon witness and to require the production of documents⁸⁶ which are currently missing in some select committees in Malaysia.⁸⁷

In terms of their composition, it is submitted that if the structure of political parties and the nomination process were to be amended, as proposed in the earlier chapter,⁸⁸ this would sever the dependence which individual members of the Legislature have on their respective political parties.

When the dependence of the individual Members of Parliament upon their respective political parties are taken away or substantially reduced, it is submitted that Members of Parliament would be more independent in their investigation and line of questioning on the Executive. As Barnhart Gordan writes:

‘The independent and informal atmosphere is dependent to a great extent on the power and influence of the political parties. If party discipline is rigid, the independence and often usefulness of a committee is severely reduced...a relaxation of party discipline will go a long way toward members being able to show the voting public that they can contribute to public policy.’⁸⁹

The credibility and independence of the select committee could be further enhanced if their deliberations, investigations, decisions and reasons are conducted and revealed in

⁸⁶ The proposal was forwarded by the Study Group on Parliamentary Committees and Committee Systems. Barnhart, Gordan op cit 65 at p40 and p107

⁸⁷ The Committee of Selection, Standing Orders Committee and House Committee. See S.O. 76(2), S.O.78 (1) and S.O.79 (I).

⁸⁸ See supra chapter entitled ‘Parliament’s Composition – A Critical Analysis of the Dewan Rakyat’

⁸⁹ Barnhart, Gordan op cit 65 at p8 and p10.

public, subject to one condition; that the decision of every member within the committee be kept secret. This will prevent members of the committee from adverse public criticisms, thereby allowing them to discuss the air their views with confidence.

Finally to ensure that the Legislature is aware of the actions and policies of the Executive, it is submitted that Parliament should be compelled to discuss the reports of the respective select committees.⁹⁰ By so doing, the defects and any maladministration of the Executive will be revealed and discussed before the Legislature.

Vote of no confidence

In respect to a vote of censure or no confidence, which theoretically enables the Legislature to remove the Executive, it is ineffective within the party system context unless the difference between the majority and minority parties is small.⁹¹ In most situations, the vote of no confidence is conversely a highly effective tool for the majority party and can be applied by the majority party as a weapon not only to restore discipline within the party but also to compel the internal opposition within the party to surrender.⁹²

A majority party facing an internal dispute within the party which may cause its defeat in the next general election may utilise the vote of no confidence or threats to use the same and sent its members to face the electorate in order to expel the dissidents of the party.⁹³ Here, it is submitted, in effect the government is exercising the 'the right of dissolution' because be it a vote of no confidence or the right of dissolution both would result in the calling of fresh elections. In extreme cases, the dissidents within the party may not even be nominated to their respective seats in the next general election.

⁹⁰ 'The Procedure Committee has suggested that eight sessions per sessions should be devoted to debates of select committees but this proposal has not been acted upon.' Barnett, Hilare., op cit 1 at p628

⁹¹ Duverger op cit 27 at p 404

⁹² Ibid

⁹³ Ibid

Developed political parties have transformed the original purpose of the vote of no confidence (which is a means for the Legislature to control or influence the Executive) into a weapon for the Executive (Cabinet) to ensure recalcitrant representative tow party lines or face expulsion by the electorate.

Although the governing National Front coalition of Malaysia has never applied the vote of confidence in such an abusive manner yet, the threat and the capability of it being exercised by the majority party is real.

Reform.

To prevent the possibility of the Executive utilising the vote of no confidence to its advantage it is submitted that the application of party whips as proposed in the earlier chapter⁹⁴ be abolish. By so doing, the Executive will not have a grip over the decisions of the Legislature therefore strengthening the doctrine of Separation of Powers.

Is Parliament's role in scrutinising the Executive strengthened?

When these proposals presented herein above are adopted into the Malaysian Parliament, the effectiveness of Parliament's role in scrutinising the Executive will be enhanced. The Executive will be compelled to give an account to and be answerable to the Legislature for their policies and administration in the following manner;

The removal of Article 63(4) of the Federal Constitution will prevent the Executive from hiding behind the cloak of Article 10 of the Federal Constitution and the Sedition Act 1948 when the Executive is questioned by the Legislature.

⁹⁴ Chapter entitled *Parliament's Law Making Function – A Critical Analysis*.

Furthermore, the removal of Article 56(4) of the Federal Constitution strengthens the proposed Islamic principle of Shura, where the Executive is compelled to consult the Legislature.

Thirdly, the proposals to the committee system in Malaysia which is aimed at increasing its independence would enable Parliament to get a more independent and exhaustive report on the detailed workings and policies of the Executive. As such Parliament would thus be able to question the Executive more effectively.

The final proposal to remove the whip system is aimed at preventing the Executive from dominating the Legislature over its decision.

With Parliament being less dependent upon the Executive, all these measures will go positively towards strengthening the doctrine of Separation of Powers between the Executive and Legislature.

The Ideal Parliament. A Reality Or Myth?

In conclusion, the examination and the exposition of the negative impact on which a Westminster style of parliamentary government composed of developed mass based political parties has on the doctrine of Separation Of Powers, encourages a brief and objective review on the Westminster style of parliamentary government itself.

Malaya did not encounter any major problems of adjusting to the new style of government when the British introduced and implemented the Westminster style of parliamentary government into Malaya. The smooth transition was mainly due to the fact that the style of government, which was practiced in Malaya then, was strikingly similar to the Westminster model of parliamentary government that was introduced by the British¹. The similarity in the styles in governing has produced a gradual and peaceful development in the political and constitutional arena in Malaysia. When the Reid Commission proposed a Westminster model of parliament for Malaya then, they had failed to take into consideration a very important factor which would determined the effectiveness of such a system, that is the existence of developed mass based political parties.²

Be that as it may, the existence of developed mass based political parties on the Westminster model of a parliamentary government has produced contrasting results.

On the positive end, the combination of developed mass based political parties on the Westminster model of a parliamentary government has resulted in a stable government. As a result of political stability in the country, Malaysia was able to enjoy continuous economic development since 1957; peaking and reaching new historical heights in the

¹ See supra chapter entitled 'The Original Intent of the Reid Commission'

² Ibid

1990³. In the midst of economic stability, democracy in the country is still maintained at the outset; the *Merdeka* Constitution is still largely in force, elections are still conducted freely and the Opposition in Parliament continues to be present. In addition, due to the parliamentary style of governing, the Malaysian government was able to respond quickly to situations that affected the country and had prevented its reoccurrence, for example, the racial riots of 1969.

On the other end of the spectrum however, the very combination of developed mass based political parties on the Westminster model of a parliamentary government has unduly increased the power of the Executive whilst simultaneously diminishing the powers and role of the Legislature. The institution of Parliament is severely affected and the meaning of Separation of Powers between the Executive and Legislature is emptied from its meaning.⁴

Although we will not be able to create a utopian parliament that is able to exercise the doctrine of Separation of Powers in all its aspects, nevertheless, various proposals can still be made and have in fact been made throughout this dissertation to strengthen the doctrine. However, these proposals have raised several pertinent questions, some which are as follows: 'Will these proposals ever be implemented or will they merely remain an intellectual discourse?' 'How effective will these proposals be?'

The answer to all these questions, it is submitted, lies with the Members of Parliament and the Malaysian society. The Malaysian society today has developed and changed in various aspects particularly in their mindset. This will provide a good catalyst and fuel to implement the various proposed reforms to the structure and organisation of the political parties as well as the reforms to parliament. On the other hand, the Members of

³ Harding, Andrew, *Law, Government and the Constitution in Malaysia*, Malayan Law Journal Sdn. Bhd., Kuala Lumpur (1996) at p 270.

⁴ See supra Chapter entitled 'Impact of Political Parties on Separation of Powers', 'Parliament's Composition - A Critical Analysis of the Dewan Rakyat', 'Parliament's Composition - A Critical Analysis of the Dewan Negara (Senate)', 'Parliament's Composition - Criticisms on the Methods of Disqualification', 'Parliament's Law Making Function - A Critical Analysis', 'Parliament's Role in Scrutinising the Executive.'

Parliament in Malaysia themselves must come to a true realisation of the actual meaning of 'representation',⁵ that is Parliament must represent the people and not the respective political parties. Such realisation, that the Malaysian Parliament must be independent of the political parties must be reflected in Parliament's composition. Once this is achieved, it is submitted that Parliament's function will naturally be effective and this would augur well for the development of the doctrine of Separation of Powers in the Malaysian Parliament. Without such realisation first dawning upon the Members of Parliament, the concept of an 'Ideal Parliament', it is submitted would just remain a myth and an intellectual exercise in futility.

In light of the change and development in attitude and mindset of Malaysians today, it should not be surprising that such positive attitude and mindset will be reflected in the Malaysian Parliament soon.

⁵ "Traditional representative democratic theory rests on two tenets. First the duty of members of Parliament of whatever party is to *represent independently* [italics mine] their whole constituencies and to further the general public interest, rather than the interest of the member's party,...; hence the party organisations outside Parliament should be primarily concerned to support, and not to dominate, the party in Parliament by organising and financing election campaigns and carrying out policy research and development. Second the government ought to be answerable to the whole community, as represented in Parliament. Dawn Oliver, *The Parties and Parliament: Representative or Intra-party Democracy*" in Jeffery Jowell and Dawn Oliver, *The Changing Constitution*, Clarendon Press Oxford, (1985) at p103

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